SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-538

ARTHUR S. SUMBRY, *et al.*,

Petitioners,

—v.—

JOHN H. LAND, Judge,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Provisions Involved 2

Statement of the Case 3

Reasons for Granting the Writ 7

1. The issuance and enforcement of the *ex parte* restraining order upheld by the Georgia courts violated the petitioners' rights under the First and Fourteenth Amendments and conflicted with this Court's decision in *Carroll* v. *Commissioners of Princess Anne County*, 393 U.S. 175 (1968) 8

2. The ruling below conflicts with this Court's decisions governing disqualification of judges 12

3. This Court should decide whether the protection against double jeopardy applies to contempt convictions for the identical conduct which gave rise to independent criminal liability 15

Conclusion 17

PAGE

APPENDIX:

Order of the Supreme Court of Georgia 1a

Opinion of the Georgia Court of Appeals 2a

Columbus, Georgia Ordinance No. 71-199 (July 24, 1971) 14a

Mayoral Proclamation (July 24, 1971) 19a

TABLE OF AUTHORITIES

Cases:

Apple Storage Co. v. Consumers Education and Pro. Assoc., 272 A.2d 496 (Pa. 1971) 9

Ashe v. Swenson, 397 U.S. 436 (1970) 15, 16

Ball v. United States, 349 U.S. 81 (1955) 15

Benton v. Maryland, 395 U.S. 784 (1969) 15

Berger v. United States, 255 U.S. 22 (1921) 14

Berry, In re, 68 Cal.2d 137 (Sup. Ct. Cal. 1968) 12

Bloom v. Illinois, 391 U.S. 194 (1968) 17

Carroll v. Commissioners of Princess Anne County, 393 U.S. 175 (1968) 7, 8, 9, 10, 12

Commonwealth v. Campana, —— Pa. ——, 304 A.2d 432 (1973) 16

Commonwealth v. Guild Theatres, Inc., 432 Pa. 378, 248 A.2d 45 (1968) 9

Community Action Group v. City of Columbus, —— F. Supp. —— (M.D. Ga. Civil Action No. 1528, Jan. 31, 1972), *aff'd*, 473 F.2d 966 (5th Cir. 1973), *reh. den.*, 475 F.2d 1404 3

Cox v. Louisiana, 379 U.S. 536 (1965) 10

PAGE

Dellinger, In re, 461 F.2d 389 (7th Cir. 1972) 13

Edwards v. South Carolina, 372 U.S. 229 (1963) 9

Grubb v. Oklahoma, 409 U.S. 1017 (1972) 16
Gundlach v. Rauhauser, 304 F. Supp. 962 (M.D. Pa. 1969) 9

Hague v. CIO, 307 U.S. 496 (1939) 10
Heflin v. United States, 358 U.S. 415 (1959) 15

Illinois v. Allen, 397 U.S. 227 (1970) 13
Irvin v. Dowd, 366 U.S. 717 (1961) 13

Johnson v. Mississippi, 403 U.S. 212 (1971) 14

LeFlore v. Robinson, 434 F.2d 933 (5th Cir. 1970), *vac. on other grds.*, 446 F.2d 715 (5th Cir. 1971) 11

Mayberry v. Pennsylvania, 400 U.S. 455 (1971) 13
Murchison, In re, 349 U.S. 133 (1955) 13, 14

Oliver, In re, 452 F.2d 111 (7th Cir. 1971) 12

People v. White, 41 Mich. App. 370, 200 N.W.2d 326 (1972) 16
Prince v. United States, 352 U.S. 322 (1937) 15

Robinson v. Neil, 409 U.S. 505 (1973) 16
Rosen v. North Carolina, 345 F. Supp. 1364 (W.D.N.C. 1972) 9

PAGE

Shuttlesworth v. City of Birmingham, 394 U.S. 131 (1969) 10
State v. Brown, 497 P.2d 1191 (Ore. 1972) 16
State ex rel. Superior Court of Snohomish County v. Sperry, 483 P.2d 608 (Sup. Ct. Wash. 1971) 12

Thornhill v. Alabama, 310 U.S. 88 (1946) 10
Tumey v. Ohio, 273 U.S. 510 (1927) 13

United States v. Dickenson, 465 F.2d 496 (5th Cir. 1972), *remanded*, 349 F. Supp. 227 (M.D. La. 1972), *aff'd*, 476 F.2d 373 (1973), *pet. for cert. filed*, 41 U.S. Law Week 3609 (May 9, 1973) 11
United States v. Hoker, —— F.2d ——, 13 Cr. L. Rep. 2524 (5th Cir. August 8, 1973) 14
United States v. Meyer, 462 F.2d 823 (D.C. Cir. 1972) 14
United States v. Seale, 461 F.2d 345 (7th Cir. 1972) 13
United States v. Townsend, 478 F.2d 1072 (3rd Cir. 1973) 14
United States v. Zarowitz, 326 F. Supp. 90 (C.D. Cal. 1971) 13

Walker v. Birmingham, 388 U.S. 307 (1967) 7, 8, 10, 11, 12
Waller v. Florida, 397 U.S. 387 (1970) 15, 16
Ward v. Village of Monroeville, 409 U.S. 57 (1972) 13
Wood v. Goodson, 485 S.W.2d 213 (Sup. Ct. Ark. 1972) 12

Constitutional Provisions:

United States Constitution
First Amendment 2, 3, 7, 8, 9, 10, 11, 12
Fifth Amendment 2
Fourteenth Amendment 2, 8

PAGE

Statute:

28 U.S.C. §1257(3) 2

Columbus, Georgia Municipal Ordinance No. 71-199 2

Other Authorities:

ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Joinder and Severance, Sec. 1.3 (Approved Draft, 1968) 16

ALI Model Penal Code §107(2) (1962) 16

Dobbs, *Contempt of Court: A Survey*, 56 COL. L. REV. 185 (1971) 12

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No. .....

ARTHUR S. SUMBRY, *et al.*,

Petitioners,

—v.—

JOHN H. LAND, Judge,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia, entered on June 26, 1973, declining to review a decision of the Georgia Court of Appeals which upheld the summary contempt convictions imposed on the petitioners by the respondent.

Opinions Below

The order of the Supreme Court of Georgia denying certiorari is unreported, and is set forth in the Appendix, *infra,* at p. 1a. The opinion of the Court of Appeals of the State of Georgia is reported at 127 Ga. App. 786, 195 S.E.2d 228, and appears in the Appendix, *infra,* at pp. 2a-13a.

Jurisdiction

The judgment of the Supreme Court of Georgia was entered on June 26, 1973. The jurisdiction of this Court is based upon 28 U.S.C. Section 1257(3).

Questions Presented

(1) Whether the petitioners' summary contempt convictions, imposed for violation of a restraining order that (a) was entered following an *ex parte* proceeding, (b) was issued two hours before a scheduled march, (c) absolutely prohibited that march, and (d) was inadequately communicated to the petitioners, violated the First and Fourteenth Amendments?

(2) Whether in the circumstances of this case the Due Process Clause of the Fourteenth Amendment required that the judge who issued an *ex parte* restraining order disqualify himself from presiding over the contempt trial of the petitioners for violating the order?

(3) Whether a conviction for contempt in a state court, immediately following a separate trial and conviction for violation of city ordinances governing the identical conduct, violates the double jeopardy protections of the Fifth and Fourteenth Amendments.

Constitutional and Statutory Provisions Involved

In addition to the First, Fifth and Fourteenth Amendments to the United States Constitution, this case also involves Columbus, Georgia Municipal Ordinance No. 71-199, authorizing the proclamation of a civil emergency, set forth in the Appendix, *infra,* at pp. 14a-18a.

Statement of the Case

The petitioners, 81 black men and women, were summarily convicted of contempt on the basis of an *ex parte* restraining order, issued by Respondent John H. Land, Judge of the Superior Court of Muscogee County, Georgia, prohibiting a scheduled march. The background is as follows.

Commencing with the summary dismissal of several black members of the Columbus, Georgia police department on May 31, 1971, members of the black community in Columbus engaged in various First Amendment activities to protest alleged police department discrimination and other forms of racial and economic discrimination in Columbus.[1] On July 24, 1971, during these demonstrations, the city council of Columbus met in special session and adopted an ordinance giving the Mayor of Columbus the power to proclaim the existence of a civil emergency (App., *infra*, pp. 5a, 14a-18a). That same day, the Mayor issued a proclamation declaring that "due to mob action and civil disobedience, a state of emergency exists in Columbus, Georgia," and directing that "all persons are hereby prohibited from gathering on the public streets or sidewalks in groups of twelve (12) or more" (App., *infra*, pp. 5a-6a, 19a).

The petitioners and others had scheduled a march, as a continuation of their protest activities, for Saturday, July 31, 1971 at 2:00 p.m. Six days after the mayor's proclama-

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[1] These activities and official reaction to them gave rise to federal court litigation in *Community Action Group* v. *City of Columbus*, —— F. Supp. —— (M.D. Ga. Civil Action No. 1528, Jan. 31, 1972), *aff'd*, 473 F.2d 966 (5th Cir. 1973), *reh. den.*, 475 F.2d 1404.

tion, on the morning of the scheduled march, J. R. Allen, the Mayor of Columbus, filed a complaint in the Superior Court of Muscogee County seeking to enjoin the protest. Various individuals, a radio station, and the Southern Christian Leadership Conference were designated as defendants. The complaint alleged that those individuals had "caused civil disorders" in Columbus, were planning a demonstration that afternoon in violation of the Mayor's proclamation, and that "as the natural consequence thereof" disorder would occur (App., *infra,* p. 6a). Although the location of all the persons named as defendants was well known, since they were subsequently served with the restraining order, none was given notice of or the opportunity to participate in the hearing.

Based on these allegations, the respondent, Judge John H. Land, then issued an *ex parte* temporary restraining order at 12:00 noon on July 31, 1971, just two hours before the scheduled march was to begin (App., *infra,* p. 7a). The order directed the Sheriff to arrest "the Defendant" in the event of non-compliance with the order, "and bring him before me at the earliest convenient time to be dealt with for contempt" (App., *infra,* p. 7a). The return of service shows that eleven persons were served with the complaint and order on July 31, 1971, and one person was served on August 1, 1971. Only two of the persons served were arrested for participating in the march (App., *infra,* p. 7a).

The march commenced shortly after 2:00 p.m. on July 31, 1971, as scheduled. The order was read to one of the named defendants at a meeting, and subsequently read from a loudspeaker in a police helicopter hovering over the march. During the subsequent contempt proceedings many of the

petitioners testified that they were unable to hear the court order read from the helicopter (App., *infra*, p. 8a).[2]

The eighty-one individuals were first tried in the police court for violation of the city ordinance prohibiting gatherings of more than 12 people, and thereafter brought before Judge Land, where they were tried for contempt for violating the court's retraining order (App., *infra*, p. 8a).

At the very outset of the contempt hearing, before any testimony was taken, Judge Land stated that he was already informed that each defendant had attended the meeting which preceded the march, that they commenced the march, that the court order was read from the police helicopter hovering overhead, and that it was explained to them that the order applied to each and every person there (T1, 3-4). The respondent then asked the assembled petitioners to show cause why they should not be held in contempt, remarking:

> This was a mass order. The Court understands that each of you could not be personally served, nor was it addressed to each of you individually, as such, but to you as a group (T1, 3).

Some of the petitioners explained that they had not heard the order or did not understand it to apply to them, but the respondent was more interested in questioning them about why they would demonstrate in support of police officers who were fired for allegedly refusing to comply

[2] A few of the petitioners did testify that they heard the order being read to Mr. Hammonds, one of the named defendants, at the meeting preceding the march, but did not understand that the order purported to apply to persons not named in the complaint (T1 29-30). ["T1" and "T2" refer to the minutes of the August 2 and August 3, 1971 contempt hearings, respectively.]

with police uniform regulations "notwithstanding their unpatriotic and un-American conduct to the American flag . . ." (T1, 8).[3] When a police witness was called, the court stated: "The information is that they could clearly hear the order from several city blocks away, is that correct?" and the witness replied, "Yes, sir" (T2, 11, 12). When petitioners' counsel asked the court if its mind was made up that a particular petitioner knew or probably knew of the injunction, the court replied in the affirmative, stating that the officers had testified that "everyone in the march could thoroughly hear this injunction read and were advised not to disobey" (T1, 13).[4]

The court then began to try each of the petitioners, rejecting defense requests for written charges, a jury trial, dismissal of charges by virtue of double jeopardy, and disqualification of the judge (T1, 15, 19, 30, 31; T2, 14). The court indicated that the sentence would be 10 days for all but eight of the petitioners, who would receive more severe punishment (T1, 42-44). The hearing adjourned and was continued the following day, August 3, 1971. At the conclusion of the proceedings, all the petitioners were given contempt sentences, of either 10 or 20 days.[5]

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[3] The black officers had been dismissed for removing an American flag patch from their uniforms.

[4] At the second day's hearing, a tape recording of police radio bulletins transmitted at the time of the march indicated that the order being read from the helicopter could not be heard (T2, 31-35).

[5] During the proceedings, Judge Land stated that he had offered to hold court on Sunday, August 1, 1971 and had made up his mind to release everyone except the "ring leaders" on the contempt charges. However, when some of the people in jail refused as Judge Land saw it, to come to court "voluntarily," he changed his mind (T1, 7).

Appeals to the Georgia Court of Appeals were noticed that same day. Thereafter, on August 25, 1971, the respondent entered an order reducing the petitioners' contempt sentences to time served and granting the petitioners' motion to dismiss the case.[6]

On appeal, the petitioners raised all of the issues presented now. Those claims were explicitly considered but rejected by the Georgia Court of Appeals in an opinion filed on November 15, 1972. Thereafter, on June 26, 1973, the Georgia Supreme Court denied a petition for certiorari raising the same issues.

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the limitations on the power of municipal authorities, executive and judicial, to interfere with and prohibit the exercise of First Amendment rights of assembly and petition. These questions implicate this Court's decisions in *Carroll* v. *Commissioners of Princess Anne County,* 393 U.S. 175 (1968) and *Walker* v. *Birmingham,* 388 U.S. 307 (1967), both of which were misapplied by the courts below. This case also presents important questions concerning the rights of persons charged with contempt of court for conduct which also gives rise to independent criminal liability.

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[6] The Georgia Court of Appeals subsequently held that those orders did not render the case moot (App., *infra,* p. 8a).

1. The issuance and enforcement of the *ex parte* restraining order upheld by the Georgia courts violated the petitioners' rights under the First and Fourteenth Amendments and conflicted with this Court's decision in *Carroll* v. *Commissioners of Princess Anne County*, 393 U.S. 175 (1968).

In the Georgia courts the petitioners argued that the restraining order that they were charged with violating was issued in contravention of the principles announced in *Carroll* v. *Commissioners of Princess Anne County*, and that their challenges to the validity of the order could not be rejected and the contempt convictions upheld on the basis of the Court's decision in *Walker* v. *Birmingham*. The Georgia courts rejected both contentions and accepted their converse.

In *Carroll*, municipal authorities obtained an *ex parte* restraining order prohibiting the holding of a white supremacist rally scheduled for that evening. This Court held that the issuance of such an order, without notice to the petitioners or a showing that notice was impossible, was invalid. The Court stated that while there might be occasions warranting temporary restraining orders, "there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate." 393 U.S. at 180. Such adversarial participation is particularly important in situations involving public demonstrations and rallies because,

> [t]he facts in any case involving a public demonstration are difficult to ascertain and even more difficult

> to evaluate. Judgment as to whether the facts justify the use of the drastic power of injunction necessarily turns on subtle and controversial assessment of the particular situation in light of legal standards which are inescapably imprecise. 393 U.S. at 183.'

In this case, although a state of civil emergency had been declared almost a week earlier, the court hearing which resulted in the issuing of the injunction was held on the day of the march, and the order issued only two hours beforehand. The city officials were well aware of the names of the officers of the group that was holding the march and the names of the attorneys that represented them, but failed to give any of these persons prior notice of the intent to seek such an injunction. *Carroll* makes it clear that in these circumstances, there is no justification for the *ex parte* character of the proceedings in the sensitive area of First Amendment rights. Nevertheless, the Georgia Court of Appeals concluded that "allegations contained in the petition supported by the oath of the city's mayor" made to a trial judge "cognizant of the conditions existing in his locality" were somehow sufficient in themselves to remove petitioners' activity from the protection of the First Amendment and the requirements of *Carroll.*

To reach such a result that court seized upon the observation in *Carroll* "that there are special, limited circumstances in which speech is so interlaced with burgeoning

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[7] A number of cases have faithfully applied these standards to cases of *ex parte* injunctions. See, e.g., *Rosen* v. *North Carolina*, 345 F. Supp. 1364 (W.D.N.C. 1972); *Gundlach* v. *Rauhauser*, 304 F. Supp. 962 (M.D. Pa. 1969); *Apple Storage Co.* v. *Consumers Education and Pro. Assoc.*, 272 A.2d 496 (Pa. 1971); *Commonwealth* v. *Guild Theatres, Inc.*, 432 Pa. 378, 248 A.2d 45 (1968).

violence that it is not protected by the broad guarantees of the First Amendment." 393 U.S. at 180. But the activity proposed and abortively engaged in—a protest march on public streets—is certainly entitled to a presumption of First Amendment protection, as this Court has repeatedly held. See, e.g., *Hague* v. *CIO*, 307 U.S. 496 (1939); *Thornhill* v. *Alabama*, 310 U.S. 88 (1946); *Edwards* v. *South Carolina*, 372 U.S. 229 (1963); *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 131, 141-142 (1969). To be sure, a considerable amount of violence and racial strife had occurred in Columbus in the weeks preceding the day of the proposed march. But the general existence of racial turbulence in a community cannot serve as blanket justification for prohibiting the specific march attempted by these particular petitioners. See, *Edwards* v. *South Carolina, supra*, 372 U.S. at 233-39; *Cox* v. *Louisiana*, 379 U.S. 536, 549-552 (1965). By proceeding *ex parte*, the respondent denied the petitioners any opportunity to show that the proposed march was constitutionally protected, an opportunity which *Carroll* holds must be afforded in order to assure "the balanced analysis and careful conclusions which are essential in the area of First Amendment adjudication." 393 U.S. at 183. The failure to afford that opportunity renders the restraining order, and the subsequent contempt proceedings and convictions violative of constitutional requirements.

And when the petitioners attempted to argue that their assembly was constitutionally protected and that the municipal authorities had demonstrated no compelling interest in preventing the march, they were met with the response that *Walker* v. *Birmingham, supra*, foreclosed such contentions (App., *infra*, pp. 12a-13a). But this case is distinguishable from *Walker*. There, a sharply divided Court

upheld the jurisdiction of Alabama contempt convictions based upon violations of an *ex parte* order prohibiting marches without a permit. The state courts refused to consider the demonstrators' challenges to the constitutionality of the injunction because there had been no motion to dissolve the order and no effort to apply for a permit. 388 U.S. at 311-12. This Court affirmed the convictions, but emphasized the fact that the petitioners had had ample time —a period of several days—to challenge the validity of the injunction, and indicated that there might be a different result where the petitioners could not have obtained expeditious review of the injunction or where the injunction was void on its face or transparently invalid. 388 U.S. at 318-19.

This case presents precisely such a situation. The restraining order was issued a scant two hours before the enjoined march was scheduled to begin. There was no opportunity to stay the respondent's order or move to dissolve it, and there was absolutely no possibility of judicial redress before the commencement of the march.[8] Moreover, the order contained an absolute prohibition on First Amendment activity of the kind which many courts have invalidated. See, e.g., *LeFlore* v. *Robinson,* 434 F.2d 933 (5th Cir. 1970), *vac. on other grds.,* 446 F.2d 715 (5th Cir. 1971) (ordinance prohibiting more than six persons demonstrating in front of business or public facility held fa-

[8] As the Fifth Circuit has observed, "[i]f there had been no opportunity to contest the unconstitutional order, as for example, if it had been issued at the very moment the march was scheduled to commence, then the premise that effective judicial remedies were available would be undermined and the result [in *Walker*] would likely have been different." *United States* v. *Dickenson,* 465 F.2d 496, 511 (5th Cir. 1972), *remanded,* 349 F. Supp. 227 (M.D. La. 1972), *aff'd,* 476 F.2d 373 (1973), *pet. for cert. filed,* 41 U.S. Law Week 3609 (May 9, 1973).

cially invalid); see also, *Wood* v. *Goodson*, 485 S.W.2d 213 (Sup. Ct. Ark. 1972); *In re Berry*, 68 Cal.2d 137 (Sup. Ct. Cal. 1968); *State ex rel. Superior Court of Snohomish County* v. *Sperry*, 483 P.2d 608 (Sup. Ct. Wash. 1971) (*en banc*); *In re Oliver*, 452 F.2d 111 (7th Cir. 1971). Indeed, even *Walker* did not involve a complete prohibition on First Amendment activity, but only an order requiring the petitioners to seek a parade permit before demonstrating.

The petitioners here, however, were put to the constitutionally impermissible choice between, on the one hand, acquiescing in an indefinite postponement of their proposed march by virtue of a transparently invalid order which they had no opportunity to challenge, or, on the other hand, risking a contempt citation by exercising their First Amendment rights. And then they were not allowed to argue that their march was constitutionally protected. Only a grave misreading of *Walker* could allow such a result. For if *Walker* is allowed to control situations like the one here, the effect is to overrule, *sub silentio*, the requirements of *Carroll*. See, Dobbs, *Contempt of Court: A Survey*, 56 Col. L. Rev. 185, 217 (1971).

2. The ruling below conflicts with this Court's decisions governing disqualification of judges.

The Georgia Court of Appeals upheld Judge Land's participation in the contempt proceedings, despite his adversarial role and embroilment in those proceedings, on the ground that the contemptuous acts had not occurred in court, and that "[a]lleged prejudice or bias of a judge which is not based on interest either pecuniary or a relationship to a party within a prohibited degree, affords no legal ground for disqualification." (App., *infra*, p. 9a).

This Court has long held that a fair trial in a fair tribunal is a basic requirement of due process. See, *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972); *In re Murchison*, 349 U.S. 133, 136 (1955). Due process may be denied by a tribunal with fixed opinions, cf. *Irvin* v. *Dowd*, 366 U.S. 717 (1961), or by circumstances that create even the likelihood or appearance of bias regardless of whether actual bias is shown. See, e.g., *Tumey* v. *Ohio*, 273 U.S. 510 (1927); *In re Murchison*, 349 U.S. 133 (1955); *Mayberry* v. *Pennsylvania*, 400 U.S. 455 (1971); *Ward* v. *Village of Monroeville, supra; In re Dellinger*, 461 F.2d 389 (7th Cir. 1972); *United States* v. *Seale*, 461 F.2d 345 (7th Cir. 1972); see also, *Illinois* v. *Allen*, 397 U.S. 227 (1970). Although *Mayberry* involved an in-court contempt, the same rule should apply to out of court contempt where there is a likelihood of bias. See *United States* v. *Zarowitz*, 326 F. Supp. 90 (C.D. Cal. 1971).

Such a likelihood of bias is strikingly apparent in this case. The circumstances surrounding the demonstration and the events which led to the issuing of the court order were extraordinarily controversial in the local community. Judge Land issued the temporary restraining order in an *ex parte* fashion and directed the immediate arrest of anyone who breached that order. In his eagerness, he attempted to bring the petitioners from jail for trial on Sunday, August 1, 1971, before they even had an opportunity to retain counsel. In such circumstances a trial judge should be disqualified from hearing alleged violations of such an order.

Furthermore, such action is particularly required where, as here, the record reflects that the judge had adopted an adversary posture with respect to the alleged contemnors.

In re Murchison, 349 U.S. 133 (1955); *United States* v. *Meyer*, 462 F.2d 823, 841 (D.C. Cir. 1972); *United States* v. *Hoker*, —— F.2d ——, 13 Cr. L. Rep. 2524 (5th Cir. August 8, 1973). Judge Land's active role as prosecutor, as well as judge, is reflected by his evident *ex parte* communications with police officers concerning the actual facts of the alleged contempts and his lack of objectivity once he had convicted the petitioners.[9]

The court's adversary role is also manifested by its political or racial antagonism toward the petitioners, which should have required disqualification. *Johnson* v. *Mississippi*, 403 U.S. 212 (1971); cf. *Berger* v. *United States*, 255 U.S. 22 (1921); *United States* v. *Townsend*, 478 F.2d 1072 (3rd Cir. 1973). Throughout the trial, Judge Land questioned the petitioners' motives, condemning the conduct of the seven black police officers whose dismissal prompted the demonstrators to protest. In *Johnson* v. *Mississippi*, *supra*, the Court held that when a circuit judge in a contempt proceeding had made intemperate and biased remarks concerning civil rights litigants and was himself a defendant in a civil rights suit, "it is plain that he was so enmeshed in matters involving petitioner as to make it most appropriate for another judge to sit. Trial before an unbiased judge is essential to due process." *Johnson* v. *Mississippi*, *supra* at 215. The same rule should have been applied here.

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[9] Judge Land denied appeals bonds and supersedeas, which had to be secured from the appellate courts. See Motion for Supersedeas (Aug. 5, 1971). That Judge Land was attempting by this action to render the case moot, and thereby defeat petitioners' attempts to secure judicial review is confirmed by his action, well after notice of appeal had been filed, to reduce the sentences to time served (App., *infra*, at 8a).

3. This Court should decide whether the protection against double jeopardy applies to contempt convictions for the identical conduct which gave rise to independent criminal liability.

The basic thrust of the protection against double jeopardy is that there shall not be multiple punishments for the same act, *Ball* v. *United States,* 349 U.S. 81 (1955); *Prince* v. *United States,* 352 U.S. 322 (1937); *Heflin* v. *United States,* 358 U.S. 415 (1959), a safeguard fully applicable to state proceedings. *Benton* v. *Maryland,* 395 U.S. 784 (1969); see *Ashe* v. *Swenson,* 397 U.S. 436, 437 n. 1 (1970).

In *Waller* v. *Florida,* 397 U.S. 387 (1970), the petitioner was charged with the violation of two municipal ordinances, destruction of city property and disorderly breach of peace. Thereafter, a separate prosecution was brought in the state court system for grand larceny, "based on the same acts of the appellants as were involved in the violation of the two city ordinances." 397 U.S. at 390. Rejecting the claim that the municipality and state were separate sovereignties, the Court held that the petitioner could not be tried by both the municipal government and the State of Florida and that the second trial improperly placed the petitioner twice in jeopardy.

Here, on Monday morning, August 2, 1971, the petitioners were first taken to the Recorder's Court and convicted of violating the Mayor's July 24 proclamation banning gathering in groups of 12 or more; each person was given a 30-day suspended sentence. Next, the petitioners were convicted for violating the city parade ordinance and

given sentences of 30 days or a $159.00 fine. Finally, they were then taken across the street to the Superior Court and convicted for contempt of that court, for marching and parading in violation of the respondent's *ex parte* order. All three prosecutions and convictions were based upon the same events—the July 31, 1971 march. Clearly, therefore, the convictions for violating the mayor's proclamation and the parade ordinance were for the "same transaction" as the conviction for violating the restraining order. *Waller* v. *Florida, supra,* 397 U.S. at 395-96 (Brennan, J., concurring); *Ashe* v. *Swenson,* 397 U.S. 436, 448-60 (1970) (Brennan, J., concurring); *Robinson* v. *Neil,* 409 U.S. 505, 511 (1973) (Brennan, J., concurring).[10]

The Georgia Court of Appeals rejected this argument, holding that the "Constitutional inhibition against double

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[10] While this Court has never held that the rule against double jeopardy must apply to subsequent prosecutions arising out of the "same transaction", see e.g., *Ashe* v. *Swenson,* 397 U.S. 436, 453-54 (1970) (Brennan, J. concurring); *Grubb* v. *Oklahoma,* 409 U.S. 1017 (1972) (Brennan, J. dissenting), in present circumstances that test may be necessary to fully preserve the protection intended by the double jeopardy clause. At its inception, in early common law, the defense of double jeopardy was well equipped to deal with successive prosecutions, as criminal statutes were broad in coverage and few in number. However, the modern age of criminal procedure has witnessed a proliferation of criminal statutes, which have combined to make the same evidence test "almost universally regarded as totally ineffective to implement the important double jeopardy guarantee of preventing successive prosecutions." *Commonwealth* v. *Campana,* —— Pa. ——, 304 A.2d 432, 437 (1973). Thus, a number of states and authorities have recently adopted the "same transaction" test urged by Justice Brennan. See, e.g., *State* v. *Brown,* 497 P.2d 1191 (Ore. 1972) (*en banc*); *People* v. *White,* 41 Mich. App. 370, 200 N.W.2d 326 (1972); *Commonwealth* v. *Campana, supra;* ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Joinder and Severance, Sec. 1.3 (Approved Draft, 1968); ALI Model Penal Code §107(2) (1962).

jeopardy is not applicable to cases of contempt." (App., *infra,* pp. 10a-11a). This ruling conflicts with decisions of this Court which have held that contempt of court is a crime in every essential respect. See, e.g., *Bloom* v. *Illinois,* 391 U.S. 194 (1968). Accordingly, the protection against double jeopardy for charges arising out of the "same transaction" should apply to charges which take the form of contempt of court.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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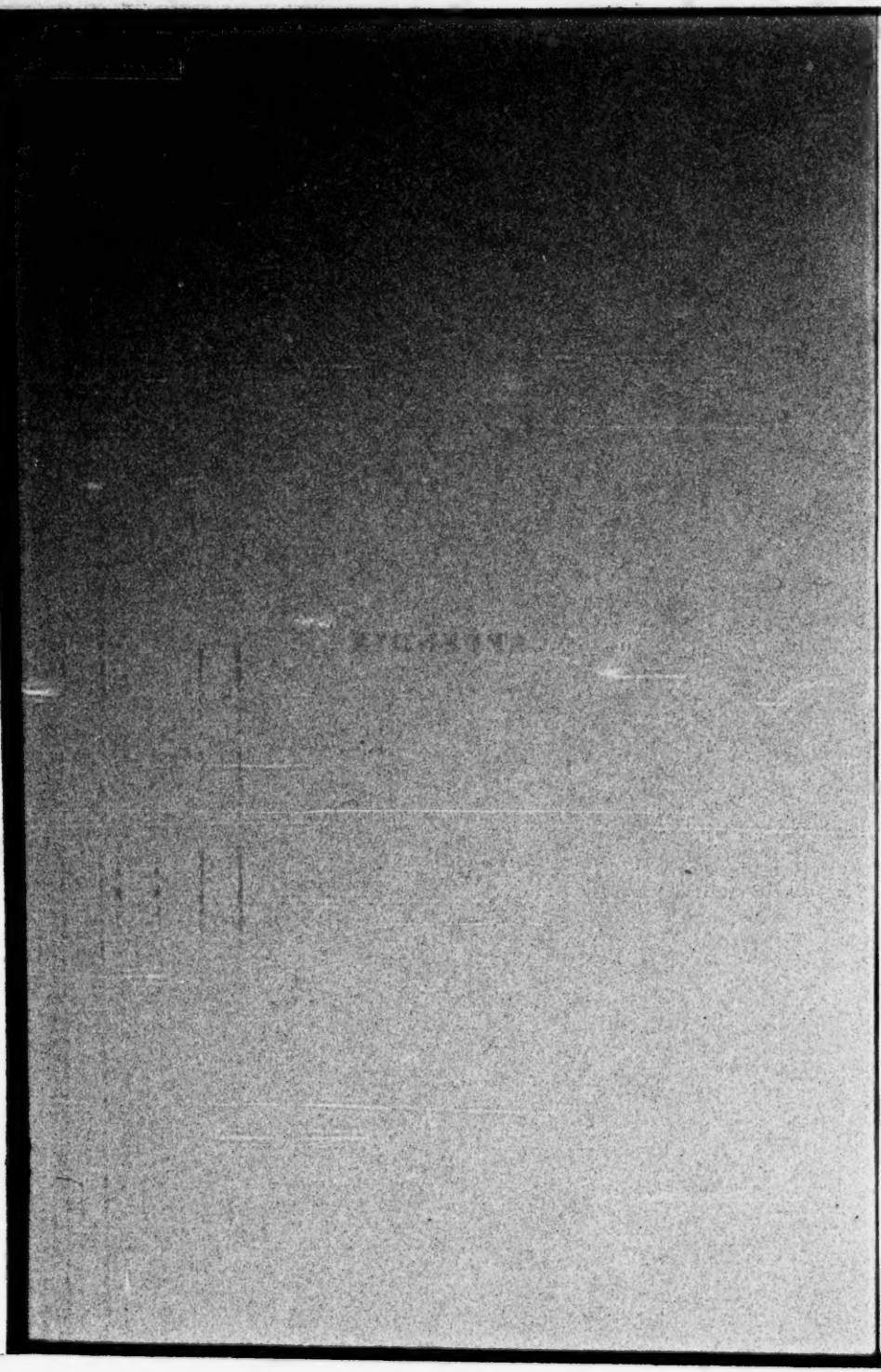

Order of the Supreme Court of Georgia

SUPREME COURT OF GEORGIA

ATLANTA, June 26, 1973

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Arthur S. Sumbry et al. v. John H. Land, Judge.

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied. All the Justices concur.

Bill of costs, $30.00.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA, June 26, 1973

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia, and that the bill of costs was paid by American Civil Liberties Union Foundation, Inc.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

JOLINE B. WILLIAMS,
Clerk.

Opinion of the Georgia Court of Appeals

Nov. 15, 1972

EBERHARDT, P.J.

DEEN & CLARK, JJ.

47316. C-66

SUMBRY *et al.*,

v.

LAND, JUDGE.

CLARK, Judge. "It was the best of times, it was the worst of times . . ." Those words which Charles Dickens used to open his novel *A Tale of Two Cities* apply appropriately to Columbus, Georgia, in the summer of 1971. The optimistic phrase refers to the hopeful outlook created for that community by consolidation of the governments of the City of Columbus and County of Muscogee so that a new body politic, known as "Columbus, Georgia", came into existence on January 1, 1971 (Ga. Laws 1969, 3571 et seq.). See Hart v. Columbus, 125 Ga. App. 625 (188 SE2d 422). The pessimistic phrase applies to the unhappy occurrences which ended in the instant appeal plus other litigation here and in the federal courts. See Diamond v. State, 126 Ga. App. 580 (191 SE2d 492) and Community Action Group v. City of Columbus, —— F. Supp. —— (Civil Action No. 1528, M.D. Ga.), presently under appeal to the U. S. Court of Appeals for the Fifth Circuit as Case No. 72-1650.

Hon. J. Robert Elliott of the United States District Court for the Middle District, in his order dated January 31, 1972, exercised judicial abstention and refrained from pass-

ing upon those "matters which are the subject of an appeal which is pending before the Georgia Court of Appeals." Although we have had the benefit of reading his order and through courtesy of the attorneys have been provided with copies of the briefs filed with the Court of Appeals for the Fifth Circuit, we have limited our consideration to the pleadings and transcript of the Muscogee Superior Court proceedings as we are not authorized to consider facts aliunde the record. Lamb v. Nabers, 224 Ga. 396(1) (162 SE2d 336); Airport Associates v. Audioptic Instructional Devices, Inc., 125 Ga. App. 325(2) (187 SE2d 567).

Counsel for both appellants and appellee have been most helpful to this court in having supplied brilliant briefs wherein they have explored in depth the legal questions. We have supplemented their research on our present-day problem of legalities involved in handling mass arrests[1] by reading the reports compiled by the National Commission on the Causes and Prevention of Violence, To Establish Justice, To Insure Domestic Tranquility and applicable law review articles. Among these was that written by Sanford J. Rosen, one of counsel of record, published in 37 Geo. Wash. L. Rev. 435 (March 1969) wherein he concluded his perceptive article by stating ". . . I have discovered no reasonably sensitive methods, other than hindsight, for determining either the morality or any other virtue of the goals and motives of the civilly disobedient."

Mr. Rosen's reference to "hindsight" applies here in that appellate courts have the benefit of such "Monday morning quarter-backing" when reviewing decisions made by trial judges. This is of direct relevance to the instant appeal

[1] In August 1972 the National Conference of Commissioners on Uniform State Laws discussed the "fourth tentative draft" of a Uniform Public Assembly Act.

where we are required to pass upon the conduct of a trial judge in his handling of contempt charges against 81 defendants that he sentenced to jail terms for alleged violation of a restraining order which he had issued forbidding a parade demonstration which appellants describe as follows: "Following the dismissal of several black members of the Columbus, Georgia Police Department for alleged failure to comply with regulations of the Police Department,[2] black people in Columbus have engaged in various First Amendment protected protest activities against the discharge and suspension of these and other black policemen and against other aspects of racial and economic discrimination in Columbus." These background factors are not contained in our record which consists of the petition, the restraining order, the contempt rule, various defense motions which will be dealt with hereafter as adverse rulings recited as enumerations of error and the transcript of the contempt hearing which ended in jailing these appellants, together with a subsequent dismissal of the complaint upon motion of the petitioner therein and an "Order of Court Amending Sentences" which reduced the sentences to the time served by each. Prior to such dismissal and reduction of sentence appellants had filed a Notice of Appeal and request for supersedeas. When such request was denied appellants petitioned our Court of Appeals which ordered "that a supersedeas be granted to stay the operation of the contempt judgment until the said judgment can

[2] The U. S. District Court order states that "While picketing in front of the Police Headquarters 7 black officers who were participating in the picketing assembled the news media, and, after a lengthy pronouncement against the Police Department and the Chief of Police and all of their superiors, made a public display of removing the United States flags from their uniforms, the flag being a prescribed part of the uniform."

be reviewed by this Court." (Vol. 16, Minutes, page 193, dated August 6, 1971).

The instant case had its inception on July 31, 1971, with presentation to Superior Court Judge John H. Land of a verified petition by J. R. Allen as plaintiff, he designating himself as being the complainant in his representative capacity as Mayor of Columbus, Georgia as well as a property owner, as a taxpayer, and also individually. Various persons, a radio station, and the Southern Christian Leadership Conference were designated as defendants. From the complaint we summarize the following:

"Defendants, together with other individuals, have on numerous occasions caused civil disorders to exist in the above mentioned city, since the 21st day of June, 1971, and have continued and are continuing to cause civil disorders resulting in property damage in the excess of $1,000,000.00 with said city, and danger to the life, limb and security of the plaintiffs and other residents, taxpayers and citizens of Columbus, Georgia." (Paragraph 3)

The Columbus City Council unanimously adopted on July 24, 1971, an ordinance, certified copy being attached, which empowered petitioner J. R. Allen as Mayor "to proclaim the existence of civil emergency . . . and authorizing the Mayor to issue such other orders as he deemed necessary for the protection of life and property on said date." (Paragraph 4). In passing the ordinance on July 24, 1971, City Council provided as a part thereof "That an emergency is hereby declared to exist for the preservation of the public peace, health and safety, by reason whereof this ordinance shall take effect immediately." That same day the Mayor issued a proclamation "that a state of emergency exists within Columbus, Georgia and prohibited assembly of

groups of twelve or more persons upon the streets and sidewalks of Columbus, Georgia." (Paragraph 4).

The assertion was made "that defendants and others are planning to form a demonstration consisting of more than twelve individuals, large and riotous crowds within territorial limits of the said consolidated government on or about 2:00 o'clock P.M., EDT, on the 31st day of July, 1971, the dissemination of this plan being broadcast in interstate commerce by Radio Station WOKS." (Paragraph 5).

Paragraph 6 recites "Columbus, Georgia, has been injured and damaged in excess of $200,000.00 and cost incurred by its police and fire departments, as a result of combating fires caused by defendants and others. The individual citizens of said city have suffered property damage in excess of $1,000,000.00.

The complaint further says that in derogation of the proclamation defendants "plan to march through said Columbus, Georgia, and that as the natural consequence thereof, a civil disorder will occur, there will be personal injuries and property damage, which plaintiff seeks to prevent." (Paragraph 7).

Paragraph 8 avers "irreparable damage and harm will be done to plaintiffs, to the taxpayers, to the residents, to the property owners and to the general public residing within said city, in the event defendants are not restrained from further gatherings, parades, demonstrations and inciting to riot. Plaintiff has exhausted all other means to avoid the imminent danger and violence."

Paragraph 9 read "By this complaint, plaintiff seeks to avoid and prevent property damage, violence, personal injury and possible deaths, which is likely to result from the planned and intended unlawful assembly and riot to be promoted and committed by the defendants and other persons acting with them."

The prayers are for a restraining order prohibiting the defendants from carrying out their proposed march and plans for a temporary and permanent injunction; for assignment of a hearing date; and for such other relief as might be proper.

Upon this petition being presented, Judge Land issued a restraining order at 12 noon on July 31, 1971. This forbade "the defendants named, their agents and servants, and any persons acting under their command and direction or acting in concert with either from participating in or carrying out the described unlawful assembly and march heretofore scheduled for 2 o'clock p.m., July 31, 1971, or at any other time until further order of this court." A paragraph therein directed law enforcement officers to arrest any violator of the order "and bring him before me at the earliest convenient time to be dealt with for contempt." Additionally the named defendants were to show cause on August 3, 1971, why the prayers for temporary injunction should not be granted. Direction was given that "a copy of this Complaint and Order be served upon the named defendants or their agents as soon as possible." The return of service on the parties named as defendants shows service to have been made on eleven of them on that date with the twelfth defendant being served the next day. Only two of those named as defendants participated in the march that took place shortly after 2 p.m. on July 31, 1971, as scheduled.

The transcript of the hearing shows the restraining order to have been read at a meeting of the marchers held immediately prior to commencement of the march and that the order was also read several times over a loud speaker from a helicopter hovering over the march before the pro-

cession started. There was testimony from police officers with reference to the loudness and clarity of the reading of the order but some defendants contended the clatter from the helicopter prevented them from hearing it. The march proceeded with lines of control being established by a police cordon and after the group had walked for a block they were arrested.

The eighty-one individuals here involved were first tried in the police court for violation of the city ordinance and thereafter brought before the superior court judge and charged with contempt of court by allegedly violating the court's restraining order. For two days defendants were tried singly and in groups. Appellants are those the court ruled to have been guilty of contempt of court. Some were sentenced to serve 10 days while others were sentenced to serve 20 days. *Held*:

1. First we must determine if petitioner's dismissal of the proceeding in the superior court with the Judge's approval and the amending order by the trial judge changing the sentences to the days already served made this appeal moot within the rulings of Miller v. Land, Judge, 126 Ga. App. 172 (190 SE2d 133) and Cagle v. PMC Dev. Co., 227 Ga. 309 (180 SE2d 545). As the trial court was without jurisdiction to supplement its judgment after appellants filed their notice of appeal on August 3, 1971, the appellants are entitled to have the legality of their convictions reviewed. Jackson v. Martin, 225 Ga. 170, 172 (167 SE2d 135); Aetna Cas. & Surety Co. v. Bullington, 227 Ga. 485(1) (118 SE2d 495); Hartman v. Brady, 117 Ga. App. 828 (162 SE2d 246). See also Carroll v. Com'rs of Princess Anne, 393 U.S. 175, 21 LE2d 325, 89 SC 347.

2. The first enumeration contends the trial court erred in not disqualifying himself from hearing the contempt citations involved in disobedience of his restraining order. The problem of a judge recusing himself has been the subject of considerable discussion in recent publications.[a] Appellants contend the transcript shows "that Judge Land had let himself get personally involved in this case" and argues that even though these contempts were not committed in the presence of the court that the direction for trial judges given in Mayberry v. Pennsylvania, 400 U.S. 455 (—— LE2d ——, —— SC ——) (1971) required him to declare himself disqualified. It should be noted that Mayberry involved disruptive conduct in court and is therefore not binding upon the trial judge here which did not involve an in-court contempt. Our Supreme Court ruled in Tibbs v. Atlanta, 125 Ga. 18, 21 (53 SE 811) that "Prejudice or bias on the part of the judge, not based on interest, nor on any other ground not named in the statute, exhibition of partisan feeling, or unnecessary expression of opinion upon the justice or merits of the controversy, are, as a general rule, not assignable as a ground for disqualification." Also Elder v. Camp, 193 Ga. 320(1) (18 SE2d 622) from which Justice (later Chief Justice) Almand quoted with unanimous concurrence of his colleagues in Jones v. State, 219 Ga. 848 (136 SE2d 848) as follows: "Alleged prejudice or bias of a judge which is not based on an interest either pecuniary or relationship to a party within a prohibited

[a] An example is the study contained in the Los Angeles Times of October 30, 1972, dealing with the United States Supreme Court captioned *Can a Justice be Sure He is Just?* and which quoted Justice Frankfurter's famous dictum in Public Utilities Com. v. Pollak, 343 U.S. 451, that "The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as to be so in fact."

degree, affords no legal ground of disqualification." In accord is Hendricks v. State, 34 Ga. App. 508(2) (130 SE 539) which dealt with a contempt rule and a trial judge's alleged activities.

3. Appellants contend error because they were denied a trial by jury. They argue the instant case had "more of the attributes of a criminal proceeding than of a civil" so that they had the constitutional right to a jury trial. Our Supreme Court has ruled there is no right to jury trial for a contempt proceeding brought for violation of a restraining order. Hortman v. Georgia Board of Dental Examiners, 214 Ga. 560 (105 SE2d 732) which followed Gaston v. Shunk Plow Co., 161 Ga. 287, 299 (130 SE 580).

4. The third enumeration of error contends violation of our constitutional provisions against double jeopardy in that the contempt convictions were for the same actions in which the appellants were found guilty of violating the city ordinance in the Recorder Court. Appellants point out that the basic thrust of the double jeopardy rule is that there should not be multiple punishments for the same act. Bell v. U. S., 349 U. S. 81 (—— LE2d ——, —— SC ——); Heflin v. U. S., 358 U. S. 415 (—— LE2d ——, —— SC ——) and contend that Waller v. Florida, 397 U. S. 387 (—— LE2d ——, —— SC ——) held a person may not be tried for the same offense in both municipal and state courts since both are part of our sovereign judicial system. We do not accept such thesis as being applicable because we view the instant cases as involving two different offenses. One involved a city ordinance and the other was wilful refusal to comply with the directions of a court order. Accordingly, this case comes within Garland v. State, 101 Ga. App. 395, 396(5) (114 SE2d 176) which held "The consti-

tutional inhibition against double jeopardy is not applicable to cases of contempt." See also Macon v. Massey, 214 Ga. 589 (106 SE2d 23).

5. The enumerations of error numbered 4, 7 and 8 attack the contempt sentences on the basis that all of the appellants with two exceptions (these being the two who were designated as defendants) were not personally served with notice of the restraining order and thus were deprived of an opportunity to rebut the allegations. "A defendant is bound to obey an injunctive order from the time he has knowledge of it, though not then actually served." Patten v. Miller, 190 Ga. 152, 153(3) (8 SE2d 786) and Murphey v. Harker, 115 Ga. 77(5) (41 SE 585). We find no merit in these enumerations of error.

6. Appellants aver their constitutional rights were violated by the court's issuance of the restraining order without prior notice and cite Carroll v. President & Comr's of Princess Anne, 393 U. S. 175 (—— LE ——, —— SC ——) as supporting this contention. In doing so they point out that the proposed demonstration was an exercise of First Amendment rights and quote from Justice Fortas's opinion at page 180 that "It was issued *ex parte,* without notice to petitioners and without any effort, however informal, to invite or permit their participation in the proceedings. There is a place in our jurisprudence for *ex parte* issuance without notice, of temporary restraining orders of short duration; but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate." They recognize Justice Fortas also went on to say there might exist "special, limited

circumstances in which speech is so interlaced with burgeoning violence that it is not protected by the broad guarantee of the First Amendment." From the secluded ivory tower of an appellate judge's chambers it would be brazen effrontery for us to disregard the allegations contained in the petition supported by the oath of the city's mayor as representative of all of the people of his municipality to a trial judge already cognizant of the conditions existing in his locality. These allegations brought this case within the purview of the "special, limited circumstances" which Justice Fortas recognized could exist and for which he quoted from Cantwell v. Connecticut, 310 U. S. 296 at page 308: "[N]o one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot."

7. The next enumeration contends error in the ruling that appellants were guilty "of violation of the order in that such a finding was contrary to the evidence." We have carefully read the transcript. There were conflicts between testimony of the police officers and the appellants, which make our consideration of this enumeration of error a matter of credibility of witnesses. "The trial judge had the privilege of accepting as true that evidence which most commended itself to his approval." Young v. Durham, 15 Ga. App. 678, 679(3) (84 SE 165). We must rule adversely to appellants on this enumeration.

8. The remaining enumerations of error are dealt with as a group in the briefs and we will do likewise. Contending the restraining order to have been legally void, appellants base this contention upon a number of U. S. Supreme Court cases which are cited under three captions: "(a) Assemblages are protected by the First Amendment; (b) Governmental interests which are not compelling do not justify

limiting speech and assemblies; (c) the city government has no compelling interests in preventing this assemblage." A study of these citations have led us to the conclusion they are not applicable. We submit the case here comes within the U. S. Supreme Court's statement at page 315 in Walker, et al. v. City of Birmingham, 388 U. S. 307 (—— LE ——, —— SC ——), "Without question, the state court that issued the injunction had, as a court of equity, jurisdiction over the petitioners [appellants] and over the subject matter of the controversy."

Having jurisdiction the chancellor (as he is sometimes called when acting in chancery) undertook to exercise the powers inherent in all courts. In doing so, and if not otherwise disqualified from acting, he had the power to pass upon the evidence as to whether or not the eighty-one appellants wilfully violated the terms of the equity court's restraining order. Under these circumstances the Supreme Court of Georgia, whose decisions are binding precedents upon this court (Ga. Const. Art. VI, Sec. II, Para. VIII, Code § 2-3708), provides the key to the decision that is to be made in this court in the case of Carroll v. Celanese Corp., 205 Ga. 493 (54 SE2d 221), headnote 4 thereof reading as follows: "Whether a contempt of court has been committed in the violation of an injunctive order, and how it shall be treated, are questions for the discretion and judgment of the court that issued the order, and its discretion will not be interfered with by this court unless there is an abuse of discretion. If there be any substantial evidence from which the judge could have concluded that his order had been violated, his finding to that effect cannot be disturbed by this court, in so far as sufficiency of the evidence is concerned. (Citations)." We find no abuse of discretion and no error.

Judgment affirmed. Eberhardt, P. J., and Deen, J., concur.

Columbus, Georgia Ordinance No. 71-199 (July 24, 1971)

AN ORDINANCE

No. 71-199

An Ordinance authorizing the Mayor of Columbus, Georgia, to proclaim existence of civil emergency; authorizing the Mayor to impose curfew during civil emergency; authorizing the Mayor to regulate the conduct of certain businesses during civil emergency; prescribing penalty for violation; and declaring an emergency.

WHEREAS, the Council of Columbus, Georgia, deems it necessary for the protection of life and property and for the preservation of the public peace and safety to grant certain executive powers to the Mayor during the existence of a civil emergency.

NOW, THEREFORE, THE COUNCIL OF COLUMBUS, GEORGIA, HEREBY ORDAINS:

SECTION 1.

Definitions:

(a) A civil emergency is hereby defined to be:

(1) A riot or unlawful assembly characterized by the use of actual force or violence or any threat to use force if accompanied by immediate power to execute by three or more persons acting together without authority of law.

(2) Any natural disaster or manmade calamity including flood, conflagration, cyclone, tornado, earthquake or explosion within the limits of Columbus, Georgia, resulting in the death or injury of persons or the destruction of property to such an extent that extraordinary measures must be taken to protect the public health, safety and welfare.

(b) Curfew is hereby defined as a prohibition against any person or persons walking, running, loitering, standing or motoring upon any alley, street, highway, public property or vacant premises within the limits of Columbus, Georgia, excepting persons officially designated on duty with reference to said civil emergency.

SECTION 2.

When in the judgment of the Mayor a civil emergency as defined herein is deemed to exist he shall forthwith proclaim in writing the existence of same.

SECTION 3.

After proclamation of a civil emergency by the Mayor, he may order a general curfew applicable to such geographical areas of Columbus, Georgia, or to Columbus, Georgia, as a whole, as he deems advisable and applicable during such hours of the day or night as he deems necessary in the interest of the public safety and welfare.

SECTION 4.

After proclamation of a civil emergency, the Mayor of Columbus, Georgia, may also, in the interest of public safety and welfare, make any or all of the following orders:

(a) Order the closing of all retail liquor stores.

(b) Order the closing of all beer taverns.

(c) Order the closing of all private clubs or portions thereof wherein the consumption of intoxicating liquor and/or beer is permitted.

(d) Order the discontinuance of the sale of beer.

(e) Order the discontinuance of selling, distributing or giving away gasoline or other liquid flammable or combustible products in any container other than a gasoline tank properly affixed to a motor vehicle.

(f) Order the closing of gasoline stations and other establishments, the chief activity of which is the sale, distribution or dispensing of liquid flammable or combustible products.

(g) Order the discontinuance of selling, distributing, dispensing or giving away of any firearms or ammunition of any character whatsoever.

(h) Order the closing of any or all establishments or portions thereof, the chief activity of which is the sale, distribution, dispensing or giving away of firearms and/or ammunition.

(i) Issue such other orders as are imminently necessary for the protection of life and property.

SECTION 5.

Any person violating the provisions of this Ordinance or executive order issued pursuant thereto shall be guilty of an offense against Columbus, Georgia, and shall be punishable by a fine not exceeding Two Hundred Fifty Dollars ($250.00) or imprisonment not exceeding ninety (90) days, either or both, in the discretion of the Recorder.

SECTION 6.

If any part, article, section, or subdivision of this ordinance shall be held unconstitutional or invalid for any reason, such holding shall not be construed to invalidate or impair the remainder of this ordinance, which shall continue in full force and effect notwithstanding such holding.

SECTION 7.

That an emergency is hereby declared to exist for the preservation of the public peace, health and safety, by reason whereof this ordinance shall take effect immediately.

Introduced and read at a special called meeting of the Council of Columbus, Georgia, held on the 24 day of July, 1971 and adopted at said meeting by the affirmative vote of 10 members of said Council.

Councilman Batastini voting Yes.
Councilman Binns voting Yes.
Councilman Forte voting Yes.
Councilman Illges voting Yes.

Councilman Land voting Yes.
Councilman McClung voting Yes.
Councilman McDaniel voting Yes.
Councilman Rigdon voting Yes.
Councilman Turgeon voting Yes.
Councilman Wright voting Yes.

This ordinance received, signed by the Mayor, at 11:15 o'clock P.M. on the day of JUL 24, 1971, and became law at said time received.

Sec. 3-202(2)

LEMUEL H. MILLER, JR.
Clerk

J. R. ALLEN
Mayor

LEMUEL H. MILLER, JR.
Clerk

Mayoral Proclamation (July 24, 1971)

PROCLAMATION

I, J. R. ALLEN, Mayor of Columbus, Georgia, by virtue of the power vested in me by the provisions of Ordinance Number 1/199 do hereby declare and determine that due to mob action and civil disobedience, a state of emergency exists within Columbus, Georgia;

All persons are hereby prohibited from gathering on the public streets or sidewalks in groups of twelve (12) or more. Any person disobeying this proclamation shall be punishable by a fine not exceeding Two Hundred Fifty Dollars ($250.00) or imprisonment not exceeding ninety (90) days, either or both, in the discretion of the Recorder.

This proclamation shall be effective immediately and shall extend until terminated by proclamation.

J. R. ALLEN
MAYOR of Columbus, Georgia

Attested By:

LEMUEL H. MILLER, JR.
Clerk of Council
Columbus, Georgia

7/24/71
11:41 P.M.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-538

ARTHUR S. SUMBRY, et al.,
Petitioners,

versus

JOHN H. LAND, Judge,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

E. H. Polleys, Jr.
Assistant City Attorney
P. O. Box 1340
Columbus, Georgia 31902

Attorney for Respondent

INDEX

Page

Objections to the Jurisdiction of the Court to Grant the Writ of Certiorari 1

Statement of the Case 5

Argument and Citations of Authority 13

A. The reasons for granting this writ do not conform with the requirements of Rule 19, nor do they attain the special importance contemplated for the exercise of judicial discretion in granting certiorari 13

B. Not one of the three topics of petitioners' argument is sufficient to allow the writ 14

Conclusion 25

Certificate of Service 28

Appendix "A" 1a

Appendix "B" 43a

TABLE OF AUTHORITIES

Cases:

Ashe v. Swenson, 397 U.S. 436, 448-460 24

In re Berry, 68 Cal. 2d 137 20

Blockburger v. United States, 234 U.S. 299, 304 24

Bonne v. City of Columbus, 87 Ga. App. 701 24

Carroll v. President and Commissioners of Princess Anne, 93 U.S. 175 ..... 13, 14, 15

Cox v. Louisiana, 379 U.S. 536, 554, 555 26

Edwards v. South Carolina, 372 U.S. 229 20

TABLE OF AUTHORITIES (Continued)

Page

Garland v. State, 101 Ga. App. 395 24

Great Western Tel. Co. v. Burnham, 162 U.S. 339 4

Hague v. Committee for Industrial Organization, 307 U.S. 496, 515, 516 20

Hines v. Etheridge, 173 Ga. 870 24

Howat v. State of Kansas, 258 U.S. 181, 189, 190 19

Johnson v. Mississippi, 403 U.S. 212 ..... 22, 23

Maher v. State, 53 Ga. 448 24

Mayberry v. Pennsylvania, 400 U.S. 455 22

Mize v. State, 49 Ga. 375 24

In re Murchison, 349 U.S. 133 22

Norfolk & Suburban Turnpike Company v. Commonwealth of Virginia, 225 U.S. 264, 32 S.Ct. 828 2

Schenck v. United States, 249 U.S. 47, 52 25

Shuttlesworth v. City of Birmingham, 394 U.S. 147 20

Smith v. State, 88 Ga. App. 749 24

State ex. rel. Superior Court of Snohomish County v. Sperry, 483 P.2d 608 (Wash. 1971) 20

Thornhill v. State of Alabama, 310 U.S. 88 21

Tippins v. State, 14 Ga. 422 24

United States v. O'Brien, 391 U.S. 367, 376, 377 25

TABLE OF AUTHORITIES (Continued)

Page

United States v. Larowitz, 326 F.Supp. 90 (C.D. Cal. 1971) 22

Walker v. City of Birmingham, 388 U.S. 307 ..... 13, 14, 15, 18

Waller v. Florida, 397 U.S. 387 ..... 23, 24

Ward v. Village of Monroeville, 409 U.S. 57 22

Western Union Telegraph Co. v. Priester, 276 U.S. 252 2

Wood v. Goodson, 485 S.W.2d 213 (Ark. 1972) 20

Miscellaneous:

28 U.S.C. Section 1257 (3) 1

Ga. Code Ann. 24-4537(b)(h) 2, 4

Ga. Code Ann. 81A-165(d)(b) 9, 16, 17

1971 Georgia Laws, Extraordinary Session, 2007, 2035, 2036 ..... 7, 8

14 C.J.S. Certiorari §105 (1939) 2

14 Am. Jur. 2d Certiorari §44 (1964) ..... 2.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. 73-538

ARTHUR S. SUMBRY, et al.,
Petitioners,

versus

JOHN H. LAND, Judge,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

OBJECTIONS TO THE JURISDICTION OF THE COURT TO GRANT THE WRIT OF CERTIORARI

Pursuant to Rule 24 (2) of this Court, Respondent makes the following observations as to the Petition and, for the following reasons, respectfully objects to the jurisdiction of this Court to grant the writ.

1.

The petition is styled as a "Petition for a Writ of Certiorari to the Supreme Court of Georgia" (Petition, cover page and page 1), and jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3) (Petition, p. 2), which allows review by this Court of the final

judgments or decrees rendered by the highest court of the state in which a decision could be had where any title, right, privilege, or immunity is specially set up or claimed under the United States Constitution. Although the petition asks that a writ be directed to the Supreme Court of Georgia ostensibly for the purpose of showing that a final judgment has been rendered, we note the general rule that a writ of certiorari be directed to the court having legal custody of the record. 14 C.J.S. Certiorari § 105 (1939); 14 Am.Jur.2d Certiorari § 44 (1964). We also note Rule 37(b) of the Georgia Supreme Court that after a denial of certiorari to the Georgia Court of Appeals the clerk of the Supreme Court will return the record to the clerk of the Court of Appeals. *Ga. Code Ann.* 24-4537(b). This Court dealt with such a matter in *Western Union Telegraph Co. v. Priester,* 276 U.S. 252, where the petitioner through an abundance of precaution filed separate petitions for writs of certiorari to the Alabama Court of Appeals and to the Alabama Supreme Court which had denied certiorari to the Court of Appeals without any indication of passing on the merits. Under these circumstances, this Court dismissed the writ to the Alabama Supreme Court and stated that the writ had been properly directed to the Court of Appeals. *Priester* cited *Norfolk & Suburban Turnpike Company v. Commonwealth of Virginia,* 225 U.S. 264, 32 S.Ct. 828, where the writ of error ran to the Supreme Court of Appeals of Virginia which had denied a writ of error to the circuit court and where Chief Justice White enunciated the rule which would be observed for future terms of court:

"While, therefore, in this case, for the reasons stated, we entertain jurisdiction, and do not of our own motion dismiss the writ, for the purpose of avoiding the complexity and doubt which must continue to recur, and for the guidance of suitors in the future, we now state that from and after the opening of the next term of this court, where a writ of error is prosecuted to an alleged judgment or a decree of a court of last resort of a state, declining to allow a writ of error to or an appeal from a lower state court, unless it plainly appears, on the face of the record, by an affirmance in express terms of the judgment or decree sought to be reviewed, that the refusal of the court to allow an appeal or writ of error was the exercise by it of jurisdiction to review the case upon the merits, we shall consider ourselves constrained to apply the rule announced in the Crovo Case, and shall therefore, by not departing from the face of the record, solve against jurisdiction the ambiguity created by the form in which the state court has expressed its action." 32 S.Ct. 828, 830, 831

2.

At no place does the petition, and particularly the statement of the grounds on which the jurisdiction of the court is invoked (Petition, p. 2), indicate the date of any order respecting a rehearing as required by Rule 23(1)(b)(ii) and Rule 23(1)(j) of this Court. We submit that such a showing is important, particularly

in view of Georgia Supreme Court Rule 37(h) that "[N]o application for certiorari shall be considered by this court unless a motion for a rehearing embracing the same contentions as are made in the petition for certiorari, was filed in the Court of Appeals and finally disposed of by that court adversely to the movant." *Ga. Code Ann.* 24-4537(h). While an examination of the published decision of the Georgia Court of Appeals, 127 Ga. App. 786, at page 797, reveals that rehearing was denied December 20, 1972, the fact nevertheless remains that the petition itself is silent as to the matter. The petition on its face would thus leave this Court in doubt as to whether petitioners seek a writ to review a final judgment by the highest court of Georgia, for the question remains as to whether petitioners properly invoked the jurisdiction of the Georgia Supreme Court. We compare this situation to that in *Great Western Tel. Co. v. Burnham,* 162 U.S. 339, where a writ of error was dismissed by this Court for want of jurisdiction as a result of petitioner's failure to present a petition to the Supreme Court of Wisconsin for leave to appeal from a circuit court in accordance with state practice. Again, we make no representation to this Court that petitioner has not, in fact, properly invoked the jurisdiction of the Georgia Supreme Court; we only observe that the petition fails to make this showing in accordance with Rule 23.

* * * *

While we realize that certiorari is a discretionary matter and that the legal system should not become too impeded with technicalities, we offer these two foregoing objections in view of the thousands of cases

— often meritorious — through which this Court annually must sift in order to obtain a manageable docket for oral argument. And we submit that when a petitioner asks this Court to hold local officials to stringent constitutional standards, a certain obligation falls upon that petitioner to observe minimum procedural standards.

STATEMENT OF THE CASE

Respondent has studied petitioners' Statement of the Case, and finds their statement woefully inadequate for anyone attempting to understand the factual situation out of which this litigation arose. The statement is replete with conclusions and is very sketchy or silent about a number of highly pertinent facts. The statement refers in a footnote to related federal court cases (Petition, p. 3), but it gives no hint as to the outcome of these cases; respondent has included these cases as Appendices "A" and "B," because each contains findings of fact which are important for a proper evaluation of the present case. In addition to the background material contained in these federal cases — which now have been finally concluded — respondent also submits to this Court a statement of facts which focuses on the events of July 31, 1971, in Columbus, Georgia. With the exception of certain omitted matter commenting upon Appellants' (here Petitioners) Statement of Facts before the Georgia Court of Appeals and with the exception of certain matter included here describing the haste with which the Mayor of Columbus had to petition the judge of the Muscogee Superior Court, the following statement of facts — with cita-

tions to the trial record and the two transcripts taken on August 2 and August 3, 1971, and cited respectively as "T2" and "T3" — our present statement is identical with the statement submitted in Appellee's (here Respondent) brief to the Georgia Court of Appeals.

Mayor J. R. Allen of Columbus, Georgia, on July 31, 1971, petitioned Judge John H. Land of the Muscogee Superior Court for a restraining order and injunction (R-7, 8) directed at various persons who had scheduled a march in Columbus for 2:00 p.m. EDT, July 31, 1971 (R-5, 6). The judge received the petition and signed the restraining order at 12:00 noon of that day under conditions and a time element described as urgent. (T3-11, 12, 79, 80, 84, 85) The march had been publicly announced (T3-11, 84), and the federal district court and the federal appeals court later made findings to the effect that this public announcement occurred on the day previous to the signing of the petition and order. (page 20 of the unpublished opinion in Civil Action No. 1528, U.S. District Court, Middle District of Georgia, appearing here in Appendix "A," page 20a-21a; 473 F.2d 966, 971, appearing here in Appendix "B," page 52a) There is no evidence that the plans to march in violation of the Mayor's Proclamation were known well enough in advance so as to provide time for a court hearing prior to the issuance of any superior court order. As it was issued, the temporary restraining order of July 31 provided for a hearing on August 3, 1971. (R-13)

We briefly should examine the nature of the mayor's office and duties as they appear in the Charter of Co-

lumbus, Georgia, and the authority by which he acted in issuing his proclamation and in petitioning the superior court to restrain and enjoin the march of July 31 which was announced on July 30 as a proposed violation of that proclamation. The mayor's duties and powers are set forth in the Charter of Columbus, Georgia, which is codified in 1971 Georgia Laws, Extraordinary Session, page 2007 and of which appellee asks this court to take judicial notice. Section 4-201 of said Charter reads in part as follows: "The Mayor shall have the power and it shall be his duty:

> "(1) To be the official spokesman for the consolidated government and its chief advocate of policy, and to see that the ordinances, resolutions, and regulations of the Council and laws of the State, subject to enforcement by him or by officers subject to his direction and supervision, are faithfully executed and enforced; ...
>
> "(6) To be recognized as the official head of the consolidated government by the courts for the purpose of receiving service of civil process, by the Governor for the purpose of military law and for all ceremonial purposes; ...
>
> "(7) To take, with consent of the Council, command of the police and govern the consolidated government by proclamation and maintain order and enforce laws in times of danger or emergency, and in the

> event the President of the United States or the Governor of the State of Georgia declares such emergency to exist, to take command of the police and govern the consolidated government and maintain order and enforce laws until such time as the Council is able to act; . . ."

1971 Georgia Laws, Extraordinary Session, 2007, 2035, 2036. The proclamation issued by the Mayor on July 24, 1971 (R-12) was pursuant to the authority vested in the Mayor by Ordinance Number 71-199 which was passed by a unanimous vote of the Council of Columbus, Georgia, on the same date. (R-9, 10, 11) Both the proclamation and the ordinance were pursuant to paragraph 7 of Section 4-201 of the Charter of Columbus, Georgia.

The Mayor's petition to the trial court specified in paragraph 3 that the defendants and other individuals on numerous occasions since June 21, 1971, had caused civil disorders resulting in property damage of over one million dollars and danger to the life and security of the citizens of Columbus, Georgia. (R-6) In addition to this specific reference to the nature of the civil disorders, specific reference is made in paragraph 4 of the petition as to the activity to be prohibited under the state of emergency, including assembly of groups of 12 or more on the streets and sidewalks. (R-6) Paragraph 5 of the petition specified the activity anticipated by the defendants, including the time, the nature in which it violated the prohibition against assemblies of 12 or more, and the dissemination of this plan by

defendant Radio Station WOKS. (R-6) Paragraph 6 of the petition specified damages and costs of over two hundred thousand dollars to the fire and police departments during the period of general disorder. (R-6, 7) Paragraph 7 of the petition specified that civil disorder would be a natural consequence of the proposed march, and that such disorder would result in personal injury and property damage which plaintiff Mayor was seeking to prevent. (R-7) Paragraphs 8 and 9 of the petition specified that irreparable damage would result and plaintiff desired to avoid such damage and violence and that plaintiff had exhausted all other means short of a temporary restraining order to avoid the imminent danger — plaintiff undoubtedly relied upon his fresh and vivid experience in the subject matter dating from June 21, 1971. (R-7)

In response to the petition a temporary restraining order was issued against certain named defendants and all persons acting in concert with them, at 12 noon on July 31, 1971, against the assembly scheduled for 2 p.m. on the same day. (R-13) This order, signed by Judge John H. Land of the Muscogee Superior Court, was served on various persons prior to the commencement of the march. (R-14, 15) In addition to this personal service, other notice, discussed below, was provided to the prospective marchers in accordance with the provisions of *Ga. Code Ann.* 81A-165(d), of which appellee asks this court to take judicial notice and which pro ides in part as follows: "Every order granting an injunction and every restraining order ... is binding only upon the parties ... and upon those persons in active concert or participation with them who

receive notice of the order by personal service or otherwise." (Emphasis added)

This temporary restraining order was read to Joe Hammonds and to the assembled marching group in the L. A. Building in Columbus, Georgia, prior to the commencement of the march. (T2-4, 10) Hammonds himself, who was one of the named defendants, read the order over a speaker and to WOKS (T2-29, 30) Some of the defendants heard the order read in the building. (T2-4, 5, 30, 39) Some of the defendants who heard the order read on the inside denied hearing the order read later on the outside from the helicopter. (T2-37, 40, 41) At least one defendant denied hearing the order either inside the building or outside in the march. (T2-50, 51) Apparently all defendants denied hearing the order from the helicopter. (T3-20)

After the reading of the order in the building, or hall, the march began on the street outside. (T2-10, 11) At that time the order was read from the helicopter hovering over the march. (T2-3, 4, 11, 14, 21, 40; T3-19, 53) This helicopter was about 100-500 feet over the march. (T2-40) The order was read over a loud speaker in the helicopter. (T2-5; T3-73) The order was broadcast by Joseph Sargis, Director of Public Safety, Columbus, Georgia. (T2-11-14, 22, 23; T3-25, 53, 62, 72) He identified himself as such. (T2-22; T3-25, 62) The Safety Director began reading as the group came out of the hall. (T3-53, 55, 56) He read the order in its entirety. (T2-5; T3-62, 63) He read the order several times. (T3-25, 63, 64)

The order could be heard clearly from several blocks away. (T2-11, 12; T3-19, 54) The order could be heard loudly and clearly by anyone in the march. (T2-14, 21, 40; T3-54, 55, 72) In addition to the testimony of Major Faison and Lieutenant Featherstone of the Columbus Police Department as to the loudness and clarity of the order, Officer Grantham of the Columbus Police Department testified that he walked alongside one of the defendants when the order was being read from the helicopter and that he heard the order loudly and clearly. (T2-48, 49) All of the persons later arrested were present on the outside during the time this order was being read. (T2-5, 14, 27, 28)

The helicopter advised the participants of the march that if they continued they would violate the temporary restraining order of the court. (T3-75) The march continued and the defendants refused to disperse after being so advised. (T2-11, 35; T3-19, 75, 76) The defendants had from three to four minutes to disperse and to discontinue the march before the cordon of police officers was tightened and they were arrested. (T3-24, 25, 55) The marchers made no attempt to leave the parade. (T3-60) After the refusal of the marchers to leave, the lines of control on the police cordon were tightened and no one was allowed to go inside or outside of the cordon at that time. (T2-23; T3-19, 21, 23, 24) In other words, the march movement was restricted after the helicopter announcement and after the march continued down the street despite the announcement. (T3-59, 60) The defendants marched for a distance of one to two blocks from the hall while the helicopter read the order and without dispersing, a maximum period of time of five minutes. (T2-51, 52, 53,

54, 55; T3-54) After these events, the defendants were arrested at the end of the block for violating the order. T2-11, 28) The police only arrested marchers who were in the street; they did not arrest bystanders on the sidewalks. (T3-61)

A voice on the police radio was recorded as saying "The bird cannot be heard on the ground." (T3-34) A voice on the police radio was recorded as saying "That chopper could not be heard —" (T3-36) There is no indication of whose voice this was, where the person was located in relation to the helicopter, or at exactly what time during the course of the events the statement was made; but there was some discussion to the effect that the statement was made after the arrests began at the end of the block. (T3-37, 38) The trial court concluded that a prior audible broadcast had been made from the helicopter — according to the testimony of the officers who were present in the vicinity of the helicopter. (T3-38, 39)

The following observations are made as throwing possible light upon the relative weight of evidence presented by appellants and appellee in the trial court. The initial defendant represented by an attorney remained silent on advice of counsel, in response to questions from the court as to her participation in the march and as to her hearing the order read by Hammonds. (T2-12) Subsequent defendants, after consulting with their attorney, did not remain silent but claimed that they did not know the order applied to them. (T2-33, 36, 42) The trial judge was asked to disqualify himself on the basis of one attorney's conclusion without presentation of evidence that the judge

was "prejudiced." (T2-15) The judge was again asked to disqualify himself by another attorney for the defendants on the basis of the attorney's "understanding" and on the basis of what the attorney described as "hearsay evidence." (T3-48, 50) Some 150 to 175 police officers were on the general scene of the march; of these officers some 50, more or less, actually made the arrests of the defendants. (T3-57, 58) From this large number of officers there is not one iota of evidence in the record that a single one of them was subpoenaed by the defendants to verify the claims of the defendants that they did not hear the order or to controvert the testimony of the police officers who heard the order read loudly and clearly from the helicopter to the participants of the march.

ARGUMENT AND CITATIONS OF AUTHORITY

A. THE REASONS FOR GRANTING THIS WRIT DO NOT CONFORM WITH THE REQUIREMENTS OF RULE 19, NOR DO THEY ATTAIN THE SPECIAL IMPORTANCE CONTEMPLATED FOR THE EXERCISE OF JUDICIAL DISCRETION IN GRANTING CERTIORARI.

As reasons for granting this writ, petitioners claim important questions concerning judicial contempt power and the limitations on municipal authorities to interfere with alleged First Amendment rights and cite the alleged misapplication by the Georgia Courts of *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175 and *Walker v. City of Birmingham*, 388 U.S. 307. (Petition, p. 7) Respondent submits that this case is a manifestation of the traditional power of the

courts to enforce their orders, that this case represents an exercise of fundamental police power, and that an examination of *Carroll* and *Walker* indicates that officials of the consolidated government of Columbus-Muscogee county, Georgia, in the summer of 1971 conducted themselves responsibly and in a constitutionally-acceptable manner. We submit that the statement of the case when compared with all authorities cited by both parties fails to show a situation in which there exist special and important reasons for the exercise of sound judicial discretion in granting a review of this case, nor have the state courts decided any federal question of substance not heretofore determined by this Court, nor have they decided any question contrary to the applicable decisions of this Court. Rule 19(1)(a)

B. NOT ONE OF THE THREE TOPICS OF PETITIONERS' ARGUMENT IS SUFFICIENT TO ALLOW THE WRIT.

1. THE ACTIONS OF THE GEORGIA TRIAL COURT AND THE AFFIRMANCE OF THE GEORGIA APPELLATE COURTS CONFORM TO ALL REQUIREMENTS CONTAINED IN *CARROLL* AND *WALKER*.

We have discussed in the Statement of the Case the reasons for issuing the ex parte restraining order. We ask this Court to reject the unfounded innuendo that city officials deliberately waited until shortly before the July 31 march before seeking an injunction. (Petition, p. 9) The facts of this case clearly distinguish

it from the procedure found wanting in *Carroll* but rather clearly call for an application of *Walker*: the Georgia Court of Appeals so found.

In *Carroll* the injunction was issued in violation of Maryland procedure, the Court did not reach the issue as to whether the facts would justify a properly issued injunction, and the Court recognized the propriety of ex parte orders and the limits of free speech in certain situations. We examine some of Justice Fortas' opinion:

> "The proceedings were *ex parte*, no notice being given to petitioners and, so far as appears, no effort being made informally to communicate with them, although this is expressly contemplated under Maryland procedure." 393 U.S. 175, 177

> "We need not decide the thorny problem of whether, on the facts of this case, an injunction against the announced rally could be justified. The 10-day order here must be set aside because of a basic infirmity in the procedure by which it was obtained. It was issued *ex parte*, without notice to petitioners and without any effort, however informal, to invite or permit their participation in the proceedings. There is a place in our jurisprudence for *ex parte* issuance, without notice, of temporary restraining orders of short duration; but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it

is impossible to serve or to notify the opposing parties and to give them an opportunity to participate.

"We do not here challenge the principle that there are special, limited circumstances in which speech is so interlaced with burgeoning violence that it is not protected by the broad guarantee of the First Amendment. In Cantwell v. State of Connecticut, 310 U.S. 296, at 308, 60 S.Ct. 900, at 905, 84 L.Ed. 1213 (1940), this Court said that '[n]o one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot.'" 393 U.S. 175, 180

We set out the portions of *Ga. Code Ann.* 81A-165 under which the trial court issued its order, we note in passing its similarity to Rule 65 of the Rules of Civil Procedure for the United States District Courts, and we submit that our Statement of Facts indicates full compliance by the trial court with this procedural rule.

Ga. Code Ann. 81A-165(b):

"No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had there-

on. Even temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; and shall expire by its terms within such time after entry, not to exceed 30 days, as the court fixes, unless the party against whom the order is directed consents that it may be extended for a longer period. In case a temporary restraining order is granted without notice, the motion for an interlocutory injunction shall be set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for an interlocutory injunction, and if he does not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require."

Ga. Code Ann. 81A-165(d):

"Every order granting an injunction and every restraining order shall be specific in

terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive notice of the order by personal service or otherwise."

The present case comes within the ambit of *Walker*, and we urge this court to consider Mr. Justice Stewart's opinion as controlling on the first topic of petitioners' argument. As to the general power of states and municipalities to regulate activities on the public streets, the decision made these observations:

"When protest takes the form of mass demonstrations, parades, or picketing on public streets and sidewalks, the free passage of traffic and the prevention of public disorder and violence become important objects of legitimate state concern. As the Court stated, in Cox v. State of Louisiana, 'We emphatically reject the notion * * * that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.' 379 U.S. 536, 555, 85 S.Ct. 453, 464, 13 L.Ed.2d 471. And as a unanimous Court stated in Cox v. State of New Hampshire:

> "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend.' 312 U.S. at 574, 61 S.Ct. at 765." 388 U.S. 307, 316

As to the general obligation of defendants to obey an injunctive order, the decision quoted *Howat v. State of Kansas*, 258 U.S. 181, 189, 190:

> "'An injunction duly issuing out of a court of general jurisdiction with equity powers, upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them, however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming, but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its

> orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished.'"

Petitioners cite other cases under this first topic, but they present different factual situations. Generally these cases do not involve violence arising out of the activities of the defendants. Here we do not have an attempt "to make criminal the peaceful expression of unpopular views" which violated the Fourteenth Amendment in *Edwards v. South Carolina*, 372 U.S. 229; nor do we have a permanent prior restraint of First Amendment freedoms "without narrow, objective, and definite standards" which the court rejected in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147. The state cases cited either involve orderly picketing by union members, *In re Berry*, 68 Cal. 2d 137, or prior restraint of newspaper trial publicity, *Wood v. Goodson*, 485 S.W.2d 213 (Ark. 1972) and *State ex. rel. Superior Court of Snohomish County v. Sperry*, 483 P.2d 608 (Wash. 1971). To illustrate that these various courts would arrive at a different result had they adjudicated the present case, we refer to the opinion of Justice Roberts in the frequently-cited case of *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515, 516:

> "The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonnance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."

Thornhill v. State of Alabama, 310 U.S. 88 is also a classic case and we quote Justice Murphy at page 105:

> "The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted. But no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter. We are not now concerned with picketing en masse or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger."

In short, we submit that the facts of the case at bar do not fit the legal principles expressed in those cases upon which petitioner relies. For those cases did not deal with a situation in which a city was for the greater part of a summer plagued by 161 arson fires and 182 false alarms and fire damage in excess of $1,118,000. (page 9 of the unpublished opinion in Civil Action No. 1528, U.S. District Court, Middle District of Georgia, appearing here in Appendix "A," page 9a-10a; 473 F.2d 966, 971, appearing here in Appendix "B", page 53a)

2. PETITIONERS HAVE MADE NO SHOWING OF BIAS REQUIRING DISQUALIFICATION OF THE TRIAL JUDGE, NOR DO ANY OF THE SEVERAL CASES CITED IN SUPPORT OF THIS THEORY CONTAIN FACTUAL SITUATIONS ANALOGOUS TO THE PRESENT CASE.

We have searched the record and transcripts of this case, and we find nothing to support the petitioners original request that the trial judge disqualify himself. We find evidence of speculation, conjecture, and perhaps even a "persecution complex" on the part of petitioners, but little else lends credibility to the proposition that this matter approaches a constitutional magnitude worthy of the attention of the nation's highest court.

Petitioner cites a case involving pecuniary interest, *Ward v. Village of Monroeville*, 409 U.S. 57, a case involving a Michigan procedure unheard of in Georgia in which a judge sits as a one-man judge-grand jury, *In re Murchison*, 349 U.S. 133; a case involving personal insults against a judge during the course of a lengthy trial, *Mayberry v. Pennsylvania*, 400 U.S. 455; a case involving affidavits stating specific facts as grounds for disqualification, *United States v. Zarowitz*, 326 F.Supp. 90 (C.D. Cal. 1971); and other cases which simply do not apply to the present situation because of the distinction in facts. Petitioners can hardly expect this Court to compare the case at bar with such a case as *Johnson v. Mississippi*, 403 U.S. 212, where two years elapsed between the time of defendant's alleged misconduct and the imposition of punishment, where the defendant was held to be entitled to

a hearing because the judge might not have been personally aware of the circumstances surrounding the misbehavior, and where the court held that the judge should have recused himself in view of the affidavits of prejudice filed by defendant and in view of the fact that the judge had been the losing party in a civil rights lawsuit begun by defendant. The *Johnson* court emphasized the need for dealing *instantly* with contemptuous conduct, but petitioners here have even attributed wicked motives to the trial judge for offering to expedite the proceedings by means of Sunday hearings. (Petition, p. 13)

Paralysis of the judicial system would result from the theory advanced here. A presumption would exist that judges are incapable of rendering fair judgments upon defendants who have the effrontery to disobey their orders. An extra "stand-by judge" would be required for every case — sitting solely for the purpose of enforcing the orders of the judge hearing the case. We are unaware of any legal, equitable, or constitutional rule that requires such an arrangement.

3. THE ACTIONS TAKEN AGAINST PETITIONERS IN THE STATE COURTS DID NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE.

In support of their third topic petitioners rely heavily on *Waller v. Florida*, 397 U.S. 387, but this reliance is misplaced. In *Waller* Chief Justice Burger rejected the Florida rule that the state and a municipality were separate sovereigns: "We decide only that the Florida Courts were in error to the extent of holding that — 'even if a person has been tried in a municipal court of the identical offense with which he is charged in

a state court, this would not be a bar to the prosecution of such person in the proper state court.'" 397 U.S. 387, 395. Georgia is in full compliance with *Waller*, for no such theory of dual sovereignty and separate trials for the same offense in different courts exists in this state. *Hines v. Etheridge*, 173 Ga. 870; *Bonne v. City of Columbus*, 87 Ga. App. 701; *Smith v. State*, 88 Ga. App. 749; *Maher v. State*, 53 Ga. 448; *Mize v. State*, 49 Ga. 375; *Tippins v. State*, 14 Ga. 422. However, the Georgia courts have specifically held that the "constitutional inhibition against double jeopardy is not the test propounded by the majority of this Court. *State*, 101 Ga. App. 395, and the Court of Appeals so held in the present case. *Waller* holds nothing to the contrary.

In citing the concurring opinion in *Ashe v. Swenson*, 397 U.S. 436, 448-460, petitioners advance the "same transaction" rule as appropriate for the present case. We note, of course, that the "same transaction" test is not the test propounded by the majority of this Court. We understand the test as to whether offenses are identical to be that announced by Justice Sutherland in *Blockburger v. United States*, 234 U.S. 299, 304: "The applicable rule is that, where the same act or tranaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." Certainly the "elements" of the various offenses in this case differ.

Even if these foregoing points were not so, the concurring opinion in *Ashe* nevertheless contains exceptions sufficient to reject petitioners' claims. Footnote

7 at page 453 provides for an exception "if no single court had jurisdiction of all the alleged crimes." It can hardly be doubted that the Recorder's Court of Columbus, Georgia, which convicted the petitioners for violating the proclamation and the parade ordinance has no jurisdiction to try a violation of a Muscogee Superior Court order. The jurisdiction of Recorder's Court is found in the Charter of the Consolidated Government of Columbus, Georgia (1971) Georgia Laws, Extraordinary Session 2007, 2064, 2065) and the jurisdiction of superior court is found in Article VI, Section IV of the Constitution of the State of Georgia of 1945 (*Ga. Code Ann.*, Chapter 2-39). Furthermore, Footnote 14, at page 460 distinguishes a situation in which different crimes result from the same transaction: the Double Jeopardy Clause does not prohibit prosecution and punishment for such separate crimes. We submit that the present case should come within the purview of both Footnotes 7 and 14.

CONCLUSION

We refer to the classic statement by Justice Holmes in *Schenck v. United States*, 249 U.S. 47, 52: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force." The *Schenck* rule applies to the case at bar.

Were Chief Justice Warren sitting on the Court today he might apply the decision which he wrote in *United States v. O'Brien*, 391 U.S. 367, 376, 377:

> "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea . . . . This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

Were Justice Goldburg sitting on this Court today he might apply the decision which he wrote in *Cox v. Louisiana*, 379 U S. 536, 554, 555:

> "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions

> or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection. One would not be justified in ignoring the familiar red light because this was thought to be a means of social protest. Nor could one, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly. Governmental authorities have the duty and responsibility to keep their streets open and available for movement. A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations."

Whatever decision this Court applies the end result is the same: the writ should be denied. We note in closing that not a single dissenting voice has been heard among all the state and federal judges who

passed upon this case and its companion case of *Community Action Group v. City of Columbus*. Certiorari was denied by a unanimous Georgia Supreme Court (Petition, Appendix 1a) and no member of the panel nor judge in regular active service on the Fifth Circuit Court of Appeals requested that the court be polled on rehearing en banc (475 F.2d 1404).

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CERTIFICATE OF SERVICE

I E. H. Polleys, Jr., Attorney for Respondent, do hereby certify that I have caused the publisher to serve by United States Air Mail, postage prepaid, three copies of Respondent's Brief in Opposition to the Petition for a Writ of Certiorari to the Supreme Court of Georgia at each of the following addresses of counsel for Petitioner: Melvin L. Wulf and Joel M. Gora, American Civil Liberties Union Foundation, 22 East 40th Street, New York, New York 10016; Emily Carssow and Neil Bradley, Southern Regional Office, ACLU Foundation, Inc., 52 Fairlee Street, N. W., Atlanta, Georgia 30303; and Sanford Jay Rosen, 145 Ninth Street, San Francisco, California 94103.

E. H. Polleys, Jr.

APPENDIX "A"

OPINION AND ORDER

Filed: Jan. 31, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

COMMUNITY ACTION GROUP, an unincorporated association; MARY BUCKNER; WILLIE PEARSON, JR.; ROBERT LEONARD; RUDOLPH ALLEN; JOSEPH HAMMONDS; WILLIAM T. CRAWFORD; ALFRED RANDOLPH; GARY L. SMITH; HOWARD U. JONES; GEORGE ARNOLD, JR.; JOHN HENRY CLARK; and WILLIAM SMITH; all for themselves and for all others similarly situated,

Plaintiffs,

versus

CITY OF COLUMBUS, a consolidated city-county (Muscogee) government; J. R. ALLEN, Mayor of Columbus; S. W. BROWN, Assistant Chief of Police of Columbus; B. F. McGUFFEY, Chief of Police of Columbus; JOSEPH W. SARGIS, Director of Safety of Columbus; JOHN H. LAND, Judge of the Superior Court for Muscogee County,

Defendants.

This is a class action brought by the Plaintiffs against the above named Defendants by which the Plaintiffs proceed under the jurisdictional provisions of 28 U.S.C. §§ 1331, 1343(3) and (4), and 2201, seeking to redress what the Plaintiffs claim to be a deprivation of rights secured to them by the First, Fourth, Fifth, Sixth, Eighth, Ninth, Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States, and by 42 U.S.C. §§ 1981, 1982, 1983, 1985, and 1988.

The Plaintiffs allege that Community Action Group (hereafter CAG) is an unincorporated association consisting of a large number of black residents of Columbus, Georgia formed for the purpose of conducting marches, parades and demonstrations in the exercise of the rights of free speech, and further allege that the Defendants have entered into a conspiracy among themselves to stifle such activity, and in pursuance thereof have caused a number of members of the black community to be punished for their activity by arrests, intimidation, etc., under the guise of enforcement of certain city ordinances, which ordinances the Plaintiffs allege are unconstitutional on their face and as applied to the Plaintiffs. The complaint further alleges that a state court injunction was obtained and issued as a part of the alleged conspiracy with intention to harass and intimidate Plaintiffs and that such injunction was contrary to Georgia law and void when issued. The relief which the Plaintiffs seek is an order of this Court enjoining any further arrests or other acts of alleged intimidation or coercion which interfere with the Plaintiffs' attempts to exercise their

rights, and the further order of this Court requiring the Defendants to take affirmative action to protect blacks from alleged illegal police action. The complaint also seeks a declaratory judgment by this Court declaring the various city ordinances referred to in the complaint to be unconstitutional and declaring that the state court injunction referred to was void ab initio, and an order requiring the state court judge to set aside any convictions for contempt obtained in connection with the state court enforcement of its injunction.

The Defendants have filed their answers in which they deny the material allegations of the complaint, denying specifically that any of the civil rights of the Plaintiffs have been denied or abridged and denying the existence of the alleged conspiracy. They deny the allegation that the ordinances referred to are unconstitutional and assert that these ordinances have been enforced by them only in the discharge of their official duties as a legitimate exercise of the police power to maintain peace and order in the community, and they assert that the state court injunction complained of was a legitimate exercise of the judicial power of the state court. The Defendants affirmatively allege that instead of being peaceful and orderly, the parades, marches and demonstrations sponsored by the Plaintiffs have produced violence and disorder and have been part of a campaign on the part of the Plaintiffs to harass the City of Columbus and its officials. In addition to the answers filed, one of the Defendants, the City of Columbus, Georgia, has filed a counterclaim against the Plaintiffs alleging that the Plaintiffs

have conspired to cause the City of Columbus harm and damage by committing acts of arson, vandalism, assaults upon police officers and firemen and other acts of violence against the citizens of said city, in consequence of which the City of Columbus in the discharge of its governmental function has suffered property damage, and as a result of the disorder allegedly caused by the Plaintiffs has been compelled to pay substantial amounts as overtime compensation to policemen and firemen, and because of the said alleged unlawful conspiracy and the damages consequent thereto the City of Columbus seeks to recover a monetary judgment against the Plaintiffs.

Full evidentiary hearing was accorded the parties and since prayers for both temporary and permanent injunction are involved in the original complaint it was stipulated that the issues with regard thereto would be submitted without the necessity for further hearing.[1] The Court has made a complete review of the extensive record compiled and now makes the findings of fact and reaches the conclusions of law embodied in this opinion, which is intended as compliance with the requirements of Rule 52 of the Federal Rules of Civil Procedure.

At the time of the beginning of the difficulties hereafter described there were 289 members of the Police Department of the City of Columbus, Georgia. Of this number 52 were black. This number represented a greater percentage of blacks on the police force than

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[1]The issue raised by the counter-claim asserted by the City of Columbus is, of course, not appropriate for consideration in this opinion.

are employed in the great majority of police departments in cities of comparable size throughout the country. Nevertheless, some of the blacks who were employed in the Columbus Police Department were dissatisfied with their status and in the spring of 1971 organized what was known as the Afro-American Police League, which was to give voice to their grievances. This group began holding a series of public meetings and some of its leaders made public speeches and conducted news conferences critical of their superiors in the Police Department. When this activity did not produce the changes which they sought, in the month of May a small group of these black police officers began daily picketing in front of Police Headquarters. They were in uniform and were accompanied by other persons not policemen who were their sympathizers. Once begun, this picketing continued on almost a daily basis, and although this action was in open defiance of their superiors these officers were not discharged from the force and neither were any arrests made in connection therewith, although at times there were as many as 81 pickets engaging in this activity in front of the Police Headquarters, this number being in violation of a picketing ordinance of the city which prescribes numerical limits for such activity. After this had gone on for several days, on May 31 while picketing in front of Police Headquarters 7 black police officers who were participating in the picketing assembled the news media and, after lengthy pronouncements against the Police Department and the Chief of Police and all of their superiors, made a public display of removing the United States flags from their uniforms, the flag being a prescribed part of the uniform. Shortly

thereafter on that day these 7 officers were discharged from the police force for conduct unbecoming an officer and being out of uniform.[2] During the following days a number of mass meetings were organized in the black community by the Afro-American Police League and the picketing continued in front of Police Headquarters.

An atmosphere was thus created which was ripe for exploitation by the prophet, the preacher and the provocateur.

The prophet was one of the black police officers who had been discharged, a Plaintiff in this case, who on June 6 addressed a crowd gathered in connection with the picketing in front of Police Headquarters, stating in substance that the whites would like to know what the blacks were going to do and that he would predict that it was going to be a long, *hot* summer.

The provocateur was Hosea Williams, an officer of the Southern Christian Leadership Conference, who came down from Atlanta and on June 19 appeared at the Police Headquarters and presented five written demands and by ultimatum gave the Police Department 48 hours to comply with them. The first demand was that all of the black policemen who had been discharged be rehired and their grievances resolved. The second demand was that the Columbus City Council

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[2]No determination is here made concerning the questions raised by these discharged officers relative to their discharge, those being matters to be determined in other litigation now pending in this court.

be reorganized so that half of its members would be black and half of its members would be white.[3] The third demand was that the jail be desegregated. The fourth demand was that 35% of the Police Department be black. The fifth demand was that within 48 hours the Police Department promote 7 black policemen to the rank of lieutenant and promote 3 black policemen to the rank of captain.

The Community Action Group (CAG) had applied for a permit to stage a protest parade on the afternoon of that date and the permit had been granted. The parade was conducted as scheduled. That night the City of Columbus experienced what was to be the first in a long series of firebombings.[4]

On the night of June 21 Williams addressed a black mass meeting at the lodge hall and in the course of his speech he told his audience that "The only thing that white people understand is violence" and reminded them that when the Indians wanted to get revenge on the white man they used the bow and arrow and he suggested that the black man had other means.

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[3]The Columbus City Council is a body which is elected by vote of the people.

[4]The firebombings which will be hereafter referred to were carried out either by the use of what is known as a "Molotov cocktail", which consists of a bottle containing a flammable fluid with a wick extending out of the neck, the wick being ignited and the device being thrown through some opening, such as, a window or a door, into a building or onto the roof of a building, or by the use of a combination of gunpowder and flammable fluid which usually involved entrance into the building which was to be the object of the arson.

Since the firebombings had already started, his audience obviously "got the message" because within a period of hours beginning at 9:10 p.m., on June 21 and ending at 3:19 a.m., on June 22, there were 21 firebombings and 9 false fire alarms.

Mr. Williams addressed other gatherings after this date, but he found it impossible to remain in the city throughout the summer because he had planned a trip to Africa. But just before leaving on his African tour he told some of the leaders in CAG that "he hoped the Negroes burned up Columbus, Georgia so bad that they would have to call him back from Africa to put it out".

The preacher was the Reverend Ralph David Abernathy, the President of the Southern Christian Leadership Conference, who also came down from Atlanta, and on June 28 addressed a large gathering at one of the churches in the black community, the speech also being broadcast over a black-oriented radio station. The Reverend Abernathy, after discussing the many "injustices suffered by the black people" stated that "as we assemble here today we may be launching a new movement that will bring a finish to the injustices put upon the black people". He followed this by saying, "How it grieves me to know that burning must take place in the city, but unless it gets right . . . I tell you that God is going to raise up . . . . Somebody said He destroyed the earth once by water but the next time he wouldn't use water, he will use fire". He also said, "I wish I could say to young people don't burn any more, but I didn't start the burning in the

first place". He followed this by saying, "Faith without work is no good. God helps those who help themselves, He has no hands but our hands". He concluded his references to fire by saying, "It grieves my heart to know that fire must come but I got a message from the young man who told me to tell you today to try and keep it non-violent". In urging other black preachers to relate themselves to the activity he said, "We don't want to hear about Shadrach, Meshach and Abednego in the fiery furnace unless you can relate it to the Columbus fiery furnace".[5]

Since Reverend Abernathy and Mr. Williams are officers in the Southern Christian Leadership Conference, which professes to adhere to the principle of "non-violence", the Court presumes that by their remarks they were suggesting "non-violent" arson, but, whatever the proper adverb, the evidence shows that within a space of a few hours following Reverend Abernathy's address there were 9 firebombings and 6 false alarms in the city.[6]

During the period of unrest beginning June 19 and ending late in the summer there were a total of 161 arson fires and 182 false alarms and these figures include only those occurring between the hours of 8:00 p.m. and 8:00 a.m. The ensuing property damage is

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[5]The preacher did not "take a text", but had he done so he might have found sufficient incitement in Luke 12:49. "I came to cast fire upon the earth; and would that it were already kindled." (Revised Version)

[6]CAG is an affiliate of the Southern Christian Leadership Conference.

estimated to exceed $1,100,000.00. The members of the Fire Department were frequently on duty for long hours, as is indicated by the fact that the City of Columbus was required to expend in excess of $24,000.00 for overtime pay for firemen during the period. Not only was the Department subjected to this stress of overtime duty, but the firemen were frequently subjected to harassment, intimidation, threats and actual injury to themselves and their equipment. During the entire history of the Fire Department prior to June 19, 1971 there had never been any instance in the city when any person had attempted to interfere with the firemen in the discharge of their duties. During this period of turmoil there were many instances in which bricks, stones, pieces of iron pipe, bottles, and other objects were thrown at the firemen as they responded to calls. In some instances the firemen were struck and injured by these objects. In a number of instances the fire trucks were damaged by such objects. There were instances when the firemen would be responding to a call and passing through a black neighborhood when shots in the nature of sniper fire was directed at the firemen and their equipment. In one instance a fire had been built in the middle of a street in a black neighborhood, it being a dead-end street, and when the firemen responded to a call to extinguish the fire and stopped at the scene of the fire they were fired upon from at least two different directions in an attempted ambush. One of the firemen was struck in the leg and the fire truck was heavily damaged, it being necessary to temporarily retire it from use for repairs. The ammunition used by those who were firing at the firemen and the equipment consisted of slugs

and smaller types. The firing came from at least two different directions and the evidence shows that at least three different weapons were used. At one time the situation became so critical until the firemen could not in safety respond to a fire call in certain areas of the city unless they were accompanied by police escort, and in more than one instance policemen were actually required to "ride shotgun" on the fire truck with the firemen in an attempt to protect them. There were also instances in black neighborhoods when the firemen were attempting to extinguish blazes which had been started with incendiary bombs when crowds of blacks gathered at the scene and attempted to physically prevent the firemen from extinguishing the blazes by impeding the movement of their equipment.

There were also instances when blacks cut the fire hoses with knives. There were actually three different incidents of this nature on one night, that being the night of June 20, and at one fire there were three sections of hose cut which had to be replaced at the scene.

There were other instances in which rocks were thrown at the firemen while they were engaged in fighting arson fires, threats and obscenities being shouted at them also.

There were also instances in which blacks who gathered at the scene of a fire attempted to shut off the water at the fire hydrants after the firemen had laid their hoses and begun to direct streams at the fire.

A review of the records maintained by the Fire Department strongly indicates that the firebombing and false alarm activity was being planned or directed. The pattern was for there to be one or more false alarms turned in, this to be followed within a few minutes by one or more actual firebombings, then more false alarms, then more firebombings. An analysis of the records maintained on two typical nights will make this apparent.

On the night of June 19 the first false alarm was turned in at 2307 hours and this was followed by a firebombing 12 minutes later at 2319 hours. Another false alarm was turned in at 2359 hours and this was followed 10 minutes later by a firebombing at 0009 hours, and another firebombing at 0021 hours, and 2 more firebombings at 0053 hours. The next false alarm came at 0144 hours and this was followed 13 minutes later by a firebombing at 0157 hours. At 0201 hours a false alarm was turned in and another false alarm was turned in at 0219 hours, and another false alarm was turned in at 0236 hours. Then these false alarms were followed by 11 firebombings, one each at 0246 hours, 0321 hours, 0325 hours, 0336 hours, 0342 hours, 0426 hours, 0428 hours, 0445 hours, 0516 hours, 0518 hours, and 0532 hours.

On the night of June 28 there were 9 firebombings between 2155 hours on June 28 and 0317 hours on June 29, and on this same night there were 9 false fire alarms. The first 2 of these false alarms were turned in shortly before 2153 hours and the first firebombing occurred 2 minutes later at 2155 hours. The next 3 false

alarms came in between that time and 2224 hours and the next firebombing occurred 5 minutes later at 2229 hours. The next false alarm was turned in at 2224 hours and this was followed by a firebombing 11 minutes later at 2235 hours, and then another firebombing 2 minutes later at 2237 hours. The next false alarm was turned in at 2245 hours and this was followed by a firebombing at 2306 hours, another at 2353 hours, another at 0004 hours on the morning of the 29th, another at 0056 hours, and another at 0317 hours.

The obvious plan was to get the firemen off on a false chase and then start a real fire or fires. Practically all of these false alarms were turned in from predominantly black areas and significantly or not the great majority of those that were turned in through fire alarm boxes came from boxes located within a three block radius of CAG headquarters. Indeed, it eventually developed that so many false alarms were coming in from this area that the Fire Department put these fire alarm boxes out of use.

Very few of the persons responsible for the false alarms and the fires were apprehended, but there was one arsonist who was apprehended as he attempted to set fire to a building on First Avenue in downtown Columbus and there were developments in this connection that are worthy of note. This man was Daniel W. Anderson, a black male with a criminal record who had become active in the CAG activities beginning at the time Hosea Williams made his address on June 19, to which reference has heretofore been made. Anderson thereafter acted as a chauffeur for the South-

ern Christian Leadership Conference staff who came to the city from Atlanta. Anderson was discovered in the building with a quantity of gunpowder and a can of a flammable liquid as he prepared to set the building afire. He escaped from the building, but was apprehended a short distance away. He subsequently confessed and in the course of the hearing conducted in this matter he testified that he along with others had participated in several of the arson incidents which occurred during the summer. He also testified that this particular attempt at arson in connection with which he was arrested was planned by him and William T. Crawford and Jessie James Warren. William T. Crawford is one of the black policemen who was discharged on May 31 and is one of the leaders in CAG and is one of the Plaintiffs in this complaint. Jessie James Warren has also been active in CAG activities and the Plaintiffs have attached an affidavit of Warren to the complaint and have incorporated its allegations as a part of the complaint. Anderson testified that the plan was to burn the building with the fuel and the gunpowder and that Crawford and Warren worked with him in preparing the incendiary material. He states that on the night the arson was to be committed Crawford and Warren took him to the building in Crawford's pick-up truck and the two of them helped him gain entrance to the building by a means which had become known to Crawford while Crawford was working this beat while he was on the police force, and that after he got inside the building Crawford and Warren handed him the incendiary material for his use. He further testified that Crawford attempted to assist him in making an escape after he ran from the

building. He stated that the reason he decided to tell all he knew about the incident was because Crawford and Warren had promised to get him a lawyer and get him out on bond if he should be apprehended, and that they did not carry out their promise.

Anderson also testified that he had heard other firebombings discussed at CAG Headquarters and that during the summer Warren stayed around Headquarters most of the time.

Neither Crawford nor Warren took the stand to contradict the testimony of Anderson.

Subsequent to Anderson's arrest Columbus police, pursuant to a search warrant obtained, made a search of the CAG Headquarters and found, among other things, on the premises a quantity of blank machine gun ammunition casings from which the gunpowder had been removed.

Anderson also testified that on one occasion during the firebombing activity he told Alfred Randolph, a black man active in the CAG organization, that he needed money to buy more gasoline to use in making firebombs and Randolph would not give him any money but allowed him to use his Gulf credit card for the purpose, and that he did use the card and bought gas in containers. He gave the name of the service station where the card was used.

Randolph is one of the Plaintiffs in this case and he has an affidavit attached to the petition which identifies him as being "Chairman of the Public Relations Committee" for CAG. Randolph did not take the stand to contradict the testimony of Anderson.

While the members of the Fire Department were undergoing nightly harassment during the weeks of disorder, they at least enjoyed some respite during daylight hours. Not so with the members of the Police Department. Their ordeal was 24 hours around the clock. Their regular 8-hour shifts were extended to 12 and many of them frequently worked 16 hours. In addition to their usual duties of patroling the city during the night, it was necessary for them to assist the Fire Department in connection with false alarms and firebombings and in protecting the firemen. As might be expected, the firebombings spawned various other incidents of disorder requiring police attention.[7] There were numerous instances in which rocks were thrown through windshields and windows of automobiles and some in which gunfire was directed at passing traffic. There were numerous reports of guns being discharged in the city and numerous instances in which false reports of incidents were made to the Police Department which nevertheless required their attention. During the nighttime hours there were instances when sniper fire was directed at the police patrol vehicles and one instance in which a patrolman was shot while patroling in a black residential area.

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[7] "Double, double toil and trouble;
Fire burn and cauldron bubble."
Shakespeare, Macbeth, Act IV.

The general disorder became so acute that the city officials requested the Governor of the State to station a contingent of State Highway Patrolmen in the city to assist the police in the performance of their duties. The Governor did so and from time to time Highway Patrolmen actively patroled the city in cooperation with the city Police force in numbers varying from a minimum of about 30 to a maximum of about 70.

During the daylight hours the CAG group and their supporters from time to time held mass meetings and conducted parades and engaged in picketing activities. There was almost daily picketing of the Police Headquarters, this picketing being carried on sometimes by as few as 10, or 12, but at other times the numbers were as many as 80. The picketing ordinance of the city does not require a permit, but it does require that persons intending to engage in picketing give prior notice of it. There were instances in which the picketing was carried on without notice and there were instances in which notice was given but then the activity was carried on at a different location. Incident to the picketing which was conducted at Police Headquarters there was considerable harassment of the police as they went to and from Headquarters. Nevertheless, there was only one instance in which any arrests were made in connection with such picketing activity.

The City's parade ordinance requires a permit. In conducting their parades the CAG group sometimes applied for a permit and sometimes did not. Although the parades were held without permit the police did not attempt to prevent any parades which occurred

during the months of June and July until after July 24. Indeed, they assisted the persons engaged in the parade demonstrations by controlling traffic and otherwise providing protection for the line of the parades. This was true although the marchers frequently baited the police who were stationed at intervals along the parade route by the use of profane and obscene language. The officers stood by and allowed these things to go on because they were under instructions not to react unless it was necessary to do so.

Reference has been made to July 24. On that date the leaders of CAG did not apply for a parade permit but announced that a massive march would be conducted from CAG Headquarters through the downtown business section and to Police Headquarters. The march did take place in late afternoon and the police made no effort to stop it and provided the usual escort and protection at street intersections There were about 400 persons in the march and its length was between four and five blocks. As the march proceeded down Broad Street one of the marchers threw a rock through a glass window of a furniture store. Although this was observed by the policemen, no attempt was made to interfere with the progress of the march and the marchers proceeded to Police Headquarters. They assembled in front of Headquarters where they completely blocked traffic in the street for a period of 45 minutes, during which time they heard speeches from various leaders of the group, during the course of which the Police Department was condemned and the privilege of "free speech" was thoroughly exercised. A senior police officer present at Headquarters then directed

that the crowd disperse. After some reluctance they did so and proceeded to continue their march toward the point of origin, CAG Headquarters. After the march had proceeded where the rear portion had reached a point about one block from Police Headquarters a large number of the marchers, variously estimated by the witnesses to be anywhere from 50 to 100, began throwing rocks, flattened beer cans, and other miscellaneous missiles, at the police officers who were stationed at a street intersection through which the march was passing. Two of the officers were struck by some of the rocks. Upon being advised of this situation the Chief of Police decided that this was a matter which could not be ignored and he directed that the marchers be dispersed, whereupon the police detail stationed at Headquarters, assisted by a number of Highway Patrolmen, did proceed to the area of the march and directed that the marchers get out of the street and leave the area. Practically all the participants in the march did comply with the order, but some resisted. A brick was thrown through the windshield and a headlight was kicked out of a marked police vehicle and five police officers were injured in various degrees to an extent requiring medical attention. Eight of the marchers were placed under arrest by the police and some of these had likewise sustained injuries requiring medical attention.

Soon after darkness arrived it became apparent that this was to be a night of general disorder, as indeed it turned out to be, there being a total of 12 firebombings and a number of false alarms within a period of 6 hours.

In this situation the City Council, which is the governing body of the city, met in emergency session and adopted an ordinance conferring certain emergency powers upon the Mayor of the City, the ordinance reciting that, "Whereas, the Council of Columbus, Georgia deems it necessary for the protection of life and property and for the preservation of the public peace and safety to grant certain executive powers to the Mayor during the existence of a civil emergency". The ordinance authorized the Mayor to proclaim a civil emergency and, having done so in the interest of public safety, to issue certain orders, enumerating them, and including the further provision that the Mayor was empowered to "issue such other orders as are imminently necessary for the protection of life and property". The last section of the ordinance recited "that an emergency is hereby declared to exist for the preservation of the public peace, health and safety, by reason whereof this ordinance shall take effect immediately". Immediately after the adoption of this ordinance the Mayor of the City in the exercise of the power conferred upon him declared a state of emergency to exist within the city and directed that "All persons are hereby prohibited from gathering on the public streets or sidewalks in groups of twelve (12) or more", and providing penalties for violation of the proclamation. It was provided that the proclamation was to become effective immediately and remain in effect until terminated by proclamation.

During the next six days CAG did not attempt to conduct any more marches, but on July 30 they made public announcement that they would ignore the May-

or's proclamation and intended to stage a massive march and demonstration on Saturday afternoon, July 31. Whereupon, the Mayor of the City on Saturday morning, July 31, made application to Judge John H. Land, Judge of the Superior Court of Muscogee County, Georgia for injunction forbidding the carrying out of the proposed march for reasons asserted in the application. Pursuant to this application Judge Land issued a temporary restraining order enjoining the persons named as Defendants in the matter and those associated with them from conducting the march planned for that afternoon and authorizing the appropriate law enforcement officers to enforce the injunction. The Judge's order was made known to the marchers and only a relatively small number attempted to conduct the march. About 90 did attempt the march and were taken into custody and cited for contempt. When, with the passage of some time, it became apparent that a degree of order had been restored in the community Judge Land dissolved his injunction, the Mayor of the City rescinded his proclamation, and the City Council rescinded the emergency ordinance. Judge Land took his action on August 25, the Mayor and Council taking their action in early September.

One of the contentions of the Plaintiffs' complaint is that the action of the City Council in adopting the emergency ordinance was the result of a "plan" or "conspiracy" to "abridge" the rights of "black people", and that in issuing the emergency proclamation there was a failure to give "scrupulous" regard to the Plaintiffs' right of freedom of assembly. The Court

notes in passing that the ordinance was adopted by the unanimous vote of the City Council with all members being present and that two of the members of the City Council are black. The Court further observes that if there were in fact any plan or conspiracy which prompted the adoption of the ordinance the action would certainly have been taken prior to July 24. During the weeks preceding the night of July 24 the City government had been obviously attempting to avoid taking any action which could have been given any interpretation as aggravation of a situation which all hoped would in time correct itself. Indeed, if any criticism of the Mayor and Council is due it would probably be that they delayed too long in taking affirmative action. The evidence indicates that if the City Council had continued to fiddle, the City might have suffered the same fate as Nero's Rome. The Council being responsible for the safety of a city being threatened with destruction by guerrilla tactics, for it to be said that the paramount consideration should have been to do nothing that might in some way temporarily impinge upon the Plaintiffs' rights of freedom of assembly is like saying a father should not shuck his clothes and swim to save a drowning child because his nudity might offend the sensibilities of onlookers.

Plaintiffs also contend that the action of Judge Land in issuing the state court restraining order was contrary to Georgia law and was part of a conspiracy between the Judge and the Mayor and the other Defendants in this case to deny the Plaintiffs their constitutional rights and ask this Court to declare Judge Land's order void. Insofar as the allegation of conspir-

acy is concerned there is no evidence in the record whatever to support such a contention and the Court concludes that such conspiracy in fact did not exist. And with regard to the question of validity or invalidity of Judge Land's injunction, it appears that all of the adjudications of contempt for alleged violation of the state court injunction are now matters which are the subject of an appeal which is impending before the Georgia Court of Appeals, and the question whether the injunction was contrary to state law and therefore void is raised by these appeals and should be determined in that proceeding by the state court and not by this Court in this proceeding. The doctrine of abstention requires that this Court in the circumstances refrain from any adjudication with regard to that matter.

Another allegation made in the complaint and elaborated upon by Plaintiffs' counsel during the course of hearing on this matter was that the combination march-demonstration which took place on July 24 was orderly and peaceful and that the marchers gave the police authorities no cause to disperse the march and that such action was taken by the police solely for the purpose of harassing the marchers and denying them their right of free speech. A review of the facts clearly demonstrates that this contention is without foundation. First, the marchers did not have a permit to parade, as required by city ordinance, and if the police authorities had wished to do so, under the provisions of the ordinance they could have stopped the march immediately upon its beginning when the marchers left CAG Headquarters. Instead, they pro-

vided the march with an escort. Second, if the police were simply looking for an excuse to disperse the marchers, even after the march began they had ample basis for doing so when the marchers knocked out a window in a business establishment on the main business street of the city, but the police took no action. Third, if the police had wished to interfere with the conduct of the march they could have forbidden the marchers to mass in front of Police Headquarters in such fashion as to completely block traffic. Fourth, if the police had wished to deprive the marchers of any right of free speech they could have refused to allow the leaders of the march to address the crowd through bull horns as they were assembled for 45 minutes in front of Police Headquarters. Instead, they took no action until it was apparent that everyone had had ample opportunity to speak as freely as desired, and then the only action taken was to remind the marchers that they had had ample time and that they would now have to move on.

The police took no action whatever to interfere with the march until the marchers assaulted the policemen along the route of the march after the marchers had left Police Headquarters, and in dispersing the marchers the police made only eight arrests out of a crowd of approximately 400. This evidence is entirely inconsistent with any suggestion that the action of the police in dispersing the marchers was with the intention of harassment or of denying them any constitutional right.

Another charge put forward by the Plaintiffs during the course of the hearing on this matter was to

the effect that the arrest of the persons who participated in the abortive march of July 31 was unjust harassment of these persons because the restraining order had not been issued far enough in advance for the marchers to have knowledge of its existence, contending that the first communication to them of any information concerning the injunction was by way of loud speaker from a police helicopter which hovered over the march after the march got under way and that this transmission from the helicopter was unintelligible to the marchers, the implication being that the marchers were trapped into exposing themselves to arrest when they otherwise would have not done so.

While there was ample evidence presented by the Defendants to contradict this assertion, we need look no further than the testimony of two of the Plaintiff's own witnesses to see that this contention is without foundation. Indeed, the first witness who testified for the Plaintiffs, Barbara Collins, stated that the marchers were at CAG Headquarters preparing to march and that a representative of the Sheriff's Department arrived and served a copy of Judge Land's injunction on the leader of the march, Joe Hammonds, and that the injunction was read to the assembled marchers before they left the Headquarters, but they decided to march anyway. She testified that the marchers knew that they would be arrested because they knew of the injunction and knew that they did not have a permit, but they went ahead because they had been told by the leaders of CAG that lawyers and bail would be provided for them. Another of the Plaintiffs' witnesses, John Harris, confirms the testimony of Bar-

bara Collins that the injunction was read to the marchers before they left the CAG Headquarters. This makes the question of whether they heard the injunction read from the helicopter immaterial.

The Plaintiffs' complaint alleges that during the course of the summer disturbances police officers made numerous unjustified arrests of blacks and subjected those arrested to abuse as a part of a plan to intimidate black citizens. At one place the complaint refers to "arrests". At another place it refers to "mass arrests". The Plaintiffs presented evidence only with regard to a few arrests. The Defendants responded by presenting evidence with regard to these same incidents. An evaluation of this testimony follows.

The Arthur Thompson Incident

Arthur Thompson is a black man who testified that he was on his way home on the night of July 24 at about 10:00 o'clock when he was approaching the intersection of Cusseta Road and Twentieth Avenue and that eight police cars came up behind him and stopped him. At another point in his testimony he says that there were eleven police cars that came up behind him and stopped him, and that eight of the cars stopped in front of him and three or four behind him. At another point in his testimony he says that four of the cars stopped in front of him and four stopped behind him. He further testified that all of these officers in these police cars which he estimated to number between 30 or 35 came to his car and ordered him out of the car and searched him and arrested him for no cause at all and put him in a police car and took him to the

police station, and that when they got him to the police station they dragged him out of the car at the back of the police station and that then ten policemen beat him with "billy clubs, shotgun butts and everything", and that as a result of the beating he sustained various personal injuries which he described. He further testified that there was another man with him by the name of Eddie Bradley and that he was taking his friend Bradley home and that Bradley was also arrested and observed all of this.

The two police officers who participated in this arrest gave a different version. Richard A. Robinson testified that at about 10:00 p.m., on July 24, he and Bruce L. Robinson were on route patrol and responded to a police radio call to go to the Cusseta Road — Twentieth Avenue intersection where another officer had just been shot by sniper fire. When they arrived at the scene there were several other patrol cars already in the area which were parked alongside the curb and a good bit of automobile traffic had been attracted to the area by the disturbance, so, traffic being congested to the extent that only one lane of traffic could move at a time, he took a position in the street under a street light and used his flashlight to direct traffic. He was stopping one lane and letting another lane go alternately. He testified that after he had been in this postion for a few moments a car approached him with its bright lights on and ran right up to him coming to a sudden stop as if to strike him, and a black male, later identified as Arthur Thompson, leaned out of the driver's side window and shouted to him to get out of his "God damn way". Robinson reached and opened the door to Thompson's automobile and Thompson

stepped out of the car with his fists up and clinched in a fighting stance. In this situation Robinson struck Thompson across the forearm with his billy club and placed him under arrest. He further testified that he, in the company of two other officers, later took Thompson to Police Headquarters and that he took Thompson inside the jail and stayed with him the entire time until he was booked and turned over to the jailer. He states that neither he nor anyone else at the jail struck Thompson in any way and that Thompson never made any complaint at any time that anyone had beaten him. He further testified that all of the police cars present in the area were already there and had been there for several minutes before Thompson ever arrived at the intersection.

Bruce L. Robinson testified to substantially the same facts as Richard A. Robinson.

In addition to being self-contradictory and somewhat incredible on the surface, the Court notes that Thompson's friend Bradley did not appear to testify in confirmation of Thompson's testimony, nor was any medical evidence offered to support his claims with regard to the injuries allegedly sustained, nor did Thompson offer to display to the Court any indication of such. It also appears from the record that Thompson appeared in Recorder's Court the morning of July 25 and was adjudged guilty in a charge of resisting arrest and there is no indication that he made any complaint of any nature to the Recorder's Court judge.

The Court finds that the testimony of Thompson is not consistent with the facts.

The Gary L. Smith Incident

This man is one of the black officers discharged on May 31 and evidence was introduced by the Plaintiffs in the form of Smith's testimony in an effort to show that Smith was arrested and abused for no just cause and only because he was one of the discharged officers.

Smith testified that he was present and participated in the demonstration in front of Police Headquarters on the afternoon of July 24 and participated in the march before it arrived at Headquarters and after it left Headquarters, and was present at the time the march was eventually broken up. He says that later that night he was parked in a car in a parking area near the intersection of Buena Vista Road and Lawyers Lane when a number of police cars pulled in and that the policemen forced him to get out of the car and searched him and that as he started to leave they stopped him and arrested him and proceeded to beat him up, hitting him on his head and in his face with night sticks. He says he was then handcuffed and that while he was handcuffed they hit him in the face and tried to choke him and continued to beat him, and that as he was being put in the patrol car a police officer kicked him and that after he was placed in the car an officer reached through the window of the car and hit him in the face with a night stick and also beat him on the head with a night stick.

In contradiction of Smith's version a police Sergeant who was present at the time and two other police officers who participated in the arrest of Smith testified that at about 1:30 a.m. on the morning of July 25 they went to the intersection of Buena Vista Road and Law-

yers Lane because there had been some sniper fire directed at a police patrol car in that area and that they found a large crowd of blacks gathered in the area where several cars were parked. They ordered the crowd to break up and practically all of those present did so. When Smith got in his car to drive off the Sergeant noticed some 30-30 rifle ammunition on the ground in the area immediately beneath the window of the driver's side of the vehicle which was occupied by Smith. Observing this, he directed that Smith be stopped, and a search of the car revealed a 30-30 rifle. Smith was arrested, and all of these officers testified that he was not mistreated in any way, but was transported to Police Headquarters and booked.

Several circumstances cast considerable doubt on the correctness of Smith's version of this incident. First, if the police officers were simply looking for some excuse to arrest Smith they had ample opportunity to have done so at the time the marchers were being dispersed on the afternoon of the 24th. No such arrest was made. Second, although a number of other persons were present at the time Smith was arrested in the early morning of July 25, none of them testified in substantiation of Smith's charges. Third, the record does not show that Smith had any difficulty in appearing in the Recorder's Court nor that he made any complaint in the Recorder's Court concerning any mistreatment. Fourth, if Smith was in fact beaten to the extent his testimony indicates he would almost certainly have required medical attention, yet no medical evidence was offered and Smith did not display to the Court any scars or other physical signs of such abuse. It is true that in response to a leading question pro-

pounded by counsel for Plaintiffs, Smith stated that he *later* went to a hospital, but we have only his bare statement to that effect and no supporting evidence of any kind.

Since one of the charges made against Smith was that of resisting arrest, the Court concludes that it is probable that the officers were required to use some force in making the arrest, but that Smith's version is greatly exaggerated.

The Robert Leonard Incident

This man is the head of the Afro-American Police League and was one of the officers discharged on May 31 and he testified that he was one of the leaders of the march on July 24. He says that when the marchers were being dispersed he saw a woman who seemed to be having some difficulty and that he was trying to help her by walking with her and that officer Billy Watson struck the woman with his billy club and that he bent over to pick her up. He identifies the woman as Mrs. Betty Williams. He says that when he bent over to pick the woman up Watson hit him in the head with the club, knocking him to his knees, and that when he tried to get up officer George A. Pearson hit him in the back of the head with a club and knocked him down. He says that officer David Vester then came and began kicking him and stomping him. He says that he got up and tried to get away, but Vester and Pearson continued to beat him with their clubs. He says that another ex-Negro policeman by the name of Gary Smith came to his aid. He further testified that when he "came around" he was in a hospital.

He says that he was later arrested on a warrant for assaulting an officer.

Each of the officers named by Leonard testified in contradiction of his testimony. Officer Watson testified that he did see Leonard in the crowd and that at the time he saw him Leonard was standing beside a black female and that he directed Leonard to get off of the street and that Leonard told him that he was assisting the woman and that he then told him that they would both have to get out of the street because it did not appear to him that the woman was in any difficulty whatever. He denies striking the woman and he denies striking Leonard and he denies that the woman at any time fell to the ground. He says that he walked away from where Leonard was after he had given the directions to get out of the street. Watson says that Officer George Pearson was not even in the general area when he first observed Leonard and that Pearson did not strike Leonard. He says the only conflict he saw between Leonard and anyone was when a few moments later he saw Leonard and Officer Vester having some difficulty and that at that time he saw Leonard strike Vester, and having struck Vester that Leonard turned and ran from the scene. He says the woman he had previously seen with Leonard was nowhere around when Vester and Leonard were having their difficulty. He did not see Vester strike Leonard at any time.

Officer David Vester testified that he saw Leonard and told him to move on as he was telling others to do and that Leonard at first made a movement as if to leave, but then suddenly turned back and hit him on the side of his head near the right ear and then "ran like a rabbit", and that he did not see Leonard

again that day. He says that he never struck Leonard nor did he see any other officer strike him. On Vester's return to Headquarters a warrant was issued for Leonard's arrest for assaulting an officer.

Officer George A. Pearson testified that he never saw Leonard in the presence of Officer Watson. He says the first time he saw Leonard was when he was some ten yards away and saw Vester telling Leonard to move on and then he saw Leonard turn and strike Vester with his fist, and then saw Leonard run away. He says he tried to head Leonard off, but that he was not able to catch him. He says Vester did not strike Leonard and he says he never touched Leonard because the closest he came to him was about ten yards. He saw no one hit Leonard.

Several things are noted with respect to Leonard's testimony. First, there were two witnesses who appeared for the *Plaintiffs* who testified contrary to Leonard's testimony. Barbara Collins says that she saw Leonard as he was attempting to assist Betty Williams, but did not see the police officer who approached them strike Leonard. It will be remembered that Leonard said that he was struck by the same officer who struck Betty Williams and was struck at the same time. The officer who is alleged to have struck Betty Williams is Officer Watson, so this would indicate that Watson did not strike Leonard.

Second, Leonard testified that ex-officer Gary Smith came to his aid, but when ex-officer Gary Smith testified, as a Plaintiffs' witness, he said nothing about going to Leonard's aid and he said that while he saw

police officers striking people, he did not see the police officers strike *anyone he knew*. Certainly Smith knew Leonard because they were two of the seven officers discharged on May 31 after the flags were removed from the uniforms and they had jointly participated in the picketing activities and in the marches. Further, since Leonard was the head of the Afro-American Police League, it is hardly likely that his identity was unknown to his fellow black officer.

Third, Leonard is acquainted with the woman he claims to have been assisting on this occasion because he identifies her by name. Yet Mr. Williams never appeared to testify in confirmation of Leonard's version of this incident. It would certainly seem that if she was the object of his concern and, therefore, the occasion for his difficulty, she could have been made available to substantiate the testimony of her benefactor.

Fourth, there was no evidence from any independent source of any medical treatment of Leonard or any hospitalization.

Lastly, the circumstantial evidence supports the version of the police officers because the testimony of the police officers that Leonard struck Officer Vester and then ran away is consistent with the action of the police officers in going back to Headquarters and having a warrant issued for his arrest for assaulting the officer, for if he had not run away they would have arrested him on the scene without the necessity of having a warrant issued.

The William T. Crawford Incident

Crawford was arrested in connection with the march of July 24.

Crawford testified that he was not participating in the march and was only observing it. He says that while he was observing the march officer Billy Watson arrested him for no reason at all and that as he was leaving the area in the company of Officer Watson that Detective Harvey Johnson attempted to hit him with a night stick and that then "15 or 20" other officers began to beat him for no reason. He says that he did not resist arrest in any way and did not say anything to the officers and was not interfering with the officers in the performance of their duties.

No witness testified in confirmation of Crawford's testimony. Several witnesses testified in contradiction.

Officers Richard A. Robinson and Grover L. Knox both testified that Crawford was actually participating in the march, being in the street with the marchers.

Officer Donald F. Grantham testified that he was one of the officers proceeding to the area of the march to disperse the marchers and as he reached the area he was headed toward the center of the street to assist an officer who appeared to be having some difficulty in the crowd and in doing so he noticed Crawford standing on the corner and had intended to go by him. He says that he did not say anything to Crawford, but as he went by Crawford, Crawford struck him in the left eye with his fist and knocked him backward, and

that as he turned from the force of the blow he grabbed Crawford's shirt and pulled him back toward the ground with him and Crawford fell on top of him. Crawford attempted to hit him some more, but he was able to ward these blows off. His eye was filling with blood from the blow as he observed two other officers approaching to assist him, but he could not say who these officers were. He says that he never hit Crawford because they were locked together on the ground.

Officer Billy Watson testified that he saw Crawford standing on the corner as the crowd was being dispersed and that as Officer Grantham passed Crawford headed toward the center of the street he saw Crawford hit Grantham in the face with his fist. When he saw this he went to Grantham's aid. He says that as Crawford and Grantham were struggling together on the ground he observed Crawford was trying to reach for something under his shirt and somebody yelled, "Watch it, he has got a gun". At that time he struck Crawford one time with his night stick. It was discovered that Crawford did have a nickel-plated revolver under his shirt in a shoulder holster. He says that Crawford was handcuffed and placed in a police car and taken to Headquarters. He denies that anyone beat Crawford after he was handcuffed or after he was placed in the patrol car.

Officer Ronald W. Lollar testified that he had seen Crawford with the marchers earlier and that he later went with the group of officers to disperse the march and while there he saw Crawford on the ground and some police officers were trying to hold him, that he

went over to the area and saw the pistol removed from under Crawford's shirt, that Crawford was still struggling with the officers in an attempt to free himself, so he placed handcuffs on him. He assisted in getting Crawford up off of the ground and at that time observed that Crawford was bleeding from a scalp wound. He was one of the officers who assisted in placing him in the patrol car.

Detective Johnson denies that he at any time attempted to strike Crawford and he says in fact that he did not even participate in dispersing the marchers, but remained at Police Headquarters the entire afternoon of July 24.

The evidence shows that Officer Grantham, who was the one allegedly struck by Crawford, was taken to the hospital and had a laceration over his left eye sutured. The evidence also shows that Crawford later received emergency treatment at the hospital for the scalp wound heretofore referred to. Crawford was charged with simple assault and resisting arrest.

The weight of the evidence is not in support of Crawford's version of this incident.

The Richard Diamond Incident

The Court also heard the testimony of Richard Diamond, a white man who was participating as a marcher or as a news reporter, or as both, in the march of July 24 in which he accuses the police of abuse and arrest without provocation, and then heard the testimony of several police officers who were at the scene

who testified that Diamond precipitated the arrest when he refused to disperse and then struck Detective R. A. Jones with a camera which Diamond was carrying. Diamond was charged with assaulting the officer, and the Court takes judicial notice of the fact that since the conclusion of the hearing in this matter Diamond has been tried by jury in the state court and convicted of the assault charge and now has his conviction on appeal. For this reason the Court deems it inappropriate to evaluate the evidence about this incident.

The foregoing is a summary of the evidence with regard to individual arrest incidents. The CAG activities began in May and continued through the summer and it will be observed that each of these arrests complained of was made within a span of a few hours on the evening of July 24 or the early morning of July 25, and even if we should accept the testimony of those arrested at face value, which we do not, it clearly would not support the contention made by the Plaintiffs in this action that the evidence shows a pattern of arrests and beatings and mistreatment during the period of these disorders as referred to in the complaint. The only evidence with regard to "mass arrests" had to do with some arrests which took place in connection with a picketing incident in front of Police Headquarters on June 21 and the arrest of the marchers who were taken into custody on July 31 and there is no evidence whatever of any abuse or mistreatment of any person arrested on those occasions.

When this complaint was originally presented to the Court there were 23 affidavits attached to the petition

which purported to paint a picture of what counsel for the Plaintiffs refer to as "police brutality", but these affidavits are not evidence in the case, and the Court notes that when the case came on for hearing only five of the twenty-three affiants were willing to appear to testify, three of those being the Plaintiffs' witnesses whose testimony has heretofore been analyzed. Obviously, those affidavits were attached with the thought of persuading the Court to issue an immediate restraining order as requested by the Plaintiffs without giving the Defendant an opportunity to test the affiants by cross-examination. Incidentally, the reliability of such affidavits may be judged by examining the affidavit of Jessie James Warren in the course of which he swears that he saw 15 officers beat Pete Leonard with clubs on July 24. "Pete" is the nickname of Robert Leonard and we have already noted that Robert Leonard testified upon the hearing of this matter that he was beaten by three officers — not fifteen. Certainly he would not be inclined to minimize the matter.

Various allegations of the complaint are without any evidence whatever to support them. For instance, Paragraph 11 of the complaint alleges as a basis for the relief sought the alleged unlawful arrest of Willie L. Pearson, Jr., one of the named Plaintiffs in the case, and the same paragraph alleges as a basis for the relief sought the alleged unlawful arrest of George Arnold, one of the named Plaintiffs in the case, and the same paragraph alleges as the basis for the relief sought the alleged unlawful arrest of Willie Ware. Neither Pearson nor Arnold nor Ware testified in sup-

port of these allegations. Indeed, neither of them appeared as witnesses with regard to any matter.

Paragraph 15 of the complaint alleges as a basis for the relief sought that "on the night of July 24 random, general searches were carried out in the black community, in homes, cars and on the streets and sidewalks". The Court heard no evidence concerning the search of any home, random or otherwise. The only evidence about the search of a car was concerning the search of a car in which a 30-30 caliber rifle was discovered, and the only search of a person had to do with the customary frisking procedure employed when a person is being taken into custody.

There are twelve individuals named as Plaintiffs in the complaint, but only three of these appeared to testify with respect to any matter, these three being Robert Leonard, William T. Crawford and Gary L. Smith, and reference has already been made to their testimony.

The Plaintiffs' case is long in allegations, but short on proof.

The Court had opportunity to observe all the witnesses and hear their testimony and, after having made a complete review of the record and having applied the usual tests to determine credibility and weight, the Court has determined that the Plaintiffs have not carried the burden of proving their contentions made and are, therefore, not entitled to the relief sought.

There is no equity in the complaint. Therefore, all of the injunctive relief prayed for is denied.

With respect to the attack made by the Plaintiffs on the various city ordinances referred to in the complaint, the Court finds that the arrests which have been made were made in good faith and not for the purpose of harassment and intimidation, and the prosecutions are proceeding in good faith. The evidence does not support the contention of the Plaintiffs that there existed a plan or conspiracy on the part of the Defendants, or any of them, to make arrests under the provisions of the city ordinances or by the use of other judicial process to deprive the Plaintiffs or members of their class of any constitutionally protected right.

All of the prosecutions complained of were initiated and pending in the state courts at the time this action was filed in this court. The persons who have been convicted in the Recorder's Court of the city for violations of these various ordinances have made their applications for jury trial in the state court, as they have the right to do under state law, and they are there raising the same constitutional questions with regard to these ordinances as are now raised here by application for declaratory judgment.

In this situation, having determined that the Plaintiffs are not entitled to the injunctive relief sought, it would be improper for this Court to consider the entry of declaratory judgment with respect to the constitutionality of these ordinances, which question can be, should be and will be determined by the state court.

See *Samuels v. Mackell, 401 U. S. 66, 27 L.Ed.2d 688 (1971)*, and *Hammond v. Brown, 450 F.2d 480 (6 Cir. 1971)*.

Accordingly, the prayer for declaratory judgment with respect to the city ordinances referred to is also denied.

IT IS SO ORDERED this 31st day of January, 1972.

/s/ J. ROBERT ELLIOTT
UNITED STATES
DISTRICT JUDGE

APPENDIX "B"

CITE AS: 473 F.2d 966 (5th Cir. 1973), *reh. den.*, 475 F.2d 1404.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-1650

COMMUNITY ACTION GROUP, An Unincorporated Association, ET AL,
Plaintiffs-Appellants,

versus

CITY OF COLUMBUS, A consolidated city-county (Muscogee) government, ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Georgia

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(February 6, 1973)

Before COLEMAN, AINSWORTH and DYER, Circuit Judges.

DYER, Circuit Judge: This class action was brought by Community Action Group (CAG), an unin-

corporated association of black residents of Columbus, Georgia, seven black police officers of the City of Columbus who were members of CAG and who were discharged from the police force, and individual members of the Association against the Mayor of the consolidated municipal government, the Director of Public Safety, the Chief and Assistant Chief of Police, and the Judge of the Superior Court for Muscogee County, Georgia.

The plaintiffs alleged that city ordinances prohibiting disorderly conduct, loitering, regulating public demonstrations, and parades were unconstitutional. They prayed for a declaratory decree and an injunction to prevent the defendants from enforcing such ordinances. Plaintiffs further sought a decree declaring that an ordinance authorizing the Mayor to proclaim the existence of a civil emergency was unconstitutional and prayed that the defendants be enjoined from enforcing the provisions of a Proclamation, issued under the authority of the ordinance, prohibiting persons from gathering on the public streets or sidewalks in groups of twelve or more. Plaintiffs further alleged that a temporary restraining order issued by a state court judge prohibiting a mass march scheduled for July 31, 1971, was void *ab initio* and asked for an order directed to the judge to set aside convictions of contempt and sentences imposed by him for violations of the restraining order. Finally, plaintiffs complained that the defendants were harassing, coercing, threatening, intimidating, and deterring plaintiffs from exercising their rights to free speech, expression, assembly, association, and equal treatment without discrim-

ination on account of race and sought to enjoin the defendants from such continued conduct.

The district court, after extensive hearings, determined that the plaintiffs were not entitled to injunctive relief, denied the prayer for a declaratory decree, and entered judgment for the defendants. This appeal ensued. We affirm.

The inutility of recanvassing all of the exulcerating events that transpired from May to September 1971 in Columbus, Georgia, which the district court dealt with *in extenso* in its opinion, requires us to summarize only those ultimate facts necessary to a decision of the panoply of arguments asserted on appeal. The following chronology of events has substantial support in the record.

In May 1971, the Columbus, Georgia, police department had a complement of 289 officers — 237 white and 52 black. Such a ratio was comparable with the constituency of departments in other municipalities of like size in the South. Nevertheless, seven black officers, members of the Afro-American Police League and CAG, together with other sympathizers, publicly complained of discrimination against the blacks within the police department. Because the seven officers felt that their pleas had fallen on deaf ears and their attempt to confer with the Chief of Police had been rebuffed, they joined with other blacks to picket the police station on May 29, 30, and 31, 1971. On May 31, with the news media assembled in front of the station, the seven black officers publicly removed the United

States flag from their uniforms and denounced their superiors and the Chief of Police. They were discharged that day for conduct unbecoming an officer and for being out of uniform. In the days that followed, picketing continued in front of the police station and mass meetings were organized and held in the black community by the Afro-American Police League and CAG.

On June 19, 1971, a parade, for which a permit was issued, was lead by Hosea Williams from the YMCA to the police station without any untoward events. He publicly made five demands to be met within forty-eight hours: (1) that thirteen black policemen be rehired, (2) that the City Council be fifty percent white and fifty percent black and that each half of the Council be elected by its own race, (3) that the jail be desegregated, (4) that thirty-five percent of the police department be black, and (5) that three captains and seven lieutenants, all black, be upgraded.

That night the tenor of Williams' speech at a mass meeting added to the unrest and tenseness of the situation in Columbus. Within above five hours the city experienced twenty-one firebombings and nine false alarms.

On June 20, the tempo of civil unrest increased. Snipers shot at a fire truck. On three different occasions, sections of a fire hose were cut. Cars were driven over fire hoses. Firemen were verbally assaulted and vilified, knives were brandished, and bricks were thrown at the fire equipment.

On June 22, two black ex-police officers were arrested for picketing the police station because the picket line exceeded the maximum of ten as limited by city ordinance.

The next day, June 23, there was a march and picketing on Broad Street.

On June 24, Number 6 Pump Company was fired on and hit six times.

On June 28, while equipment was answering an alarm, a fireman was struck by a thrown rock.

A parade permit was granted for a march on July 10, but no parade was held. Another permit was granted, but not picked up, for a march held on July 17.

On July 20, while attempting to answer a fire alarm at the Masonic Temple, in the vicinity of CAG headquarters, cars with blacks blocked the street and gave way slowly. A half brick struck a fireman riding on an engine. Shortly thereafter the firemen responded to a false alarm and while there received another alarm. Still another alarm required them to again pass the Temple and while on this run a brick struck the right rear fender. While working this fire they received a fire bombing alarm to which they responded. At the scene the police had to threaten the use of tear gas to clear the area of blacks.

Late at night on July 23, the fire equipment arrived at the scene of a fire at a lumber yard close to the

downtown area. When it was observed that the water pressure had dropped, a black male was seen turning off the hydrant. He was subsequently apprehended and convicted.

The following day, July 24, was the apogee of the civil disturbance and disorder in Columbus. There was a mass march of 200-400 persons from CAG headquarters to the police station. Although the parade was in violation of the ordinance requiring an application for and the issuance of a parade permit, the Chief of Police ordered the police not to interfere with a peaceful march and to make no arrests unless necessary. Police escorts were furnished for the front and rear of the march to control traffic at intersections and to insure the safety of the marchers.

On the way to the police station one of the marchers threw a rock through a window in a furniture store. Although this was observed by the police, they did not interfere with the parade which proceeded to the police station without further incidents.

At police headquarters the marchers staged a sit-in which effectively blocked 1st Avenue and the front of the station. They remained there approximately forty five minutes listening to speeches made from the steps of the police department. The police then announced that the area was to be cleared within five minutes. The marchers formed a two-abreast column and began their return to CAG headquarters. Officers Folds and Yates were standing in the intersection of 9th Street and 1st Avenue for traffic control. They had shotguns.

Some of the marchers accused Folds of pointing his gun at them. This he denied. In any event, as the last 100 to 150 marchers were passing the intersection, the marchers started calling the officers offensive names; soon rocks, gravel, flattened beer cans, and bricks were thown at the officers. Folds was hit but not injured. He requested the officers in a patrol car following the marchers to call for assistance.

When the Chief of Police was informed of the trouble he dispatched a number of officers to the scene. They approached the parade from the rear. The escort police car leading the parade from the police station to CAG headquarters was momentarily pulled to the curb at 3rd Avenue and 8th Street. While it was parked a brick was thrown through the windshield and two blacks kicked out one of the headlights. Another black threw a second brick at the car. When this occurred, a police major in an adjacent car gave an order to disperse the marchers. A general melee ensued. Most of the marchers began to run in all directions. A few refused to disperse or leave the area and were arrested. The police fought with those that resisted. Five police officers were injured and required medical attention. Seven marchers were arrested, five of whom also required medical attention. There is a sharp conflict in the evidence concerning the need for the use of force by the police and whether it was excessive. The marchers claimed that they were unnecessarily attacked and brutally beaten. The officers involved denied this. They claimed that they used only such force as necessary

to defend themselves and to subdue those that resisted arrest.[1]

Columbus did not experience the cool of the evening on July 24. While a police car was on its way to the fire station to escort a fire engine responding to an alarm, four to six shots were fired at it by a sniper.

About nine-thirty it was reported that a black man was shooting out of a car on Cussetta Road. An officer was dispatched to the scene and, while he was sitting in his police car, shotgun blast shattered the rear window and the pellets struck him on the side of the head.

On a run to put out a fire built in the middle of Bremer Avenue, a series of gunshots hit the fire truck door and a fireman's leg. Six pellets hit the window, a 30 caliber bullet struck the engine behind the left front wheel, a 32 caliber bullet hit the tire, and another bullet hit the back of the truck. The shots obviously came from three types of weapons.

On the way to a fire at Rush Motorcycle Company a fireman was struck in the head by a piece of iron pipe thrown at him.

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[1]Richard A. Diamond was one of those arrested and he required medical treatment. He was later convicted in the State Court of Muscogee County of simple assault. On appeal the Court of Appeals of Georgia held that the State's evidence, "that during a riot or near-riot during a 'peace march' . . . the defendant, a photographer for a local Columbus newspaper, struck a policeman with a camera, and thereafter several policemen were required in order to subdue him" established a clear case of battery, so that a conviction of simple assault was contrary to law. *Diamond v. State*, Ga. App. 1972, 191 S.E.2d 492.

Complaints of police harassment and brutality were asserted with respect to the arrest of Arthur Thompson and Gary Smith that night. On conflicting evidence the district court found that the circumstances in each case warranted arrest and that excessive force was not used.

About eleven o'clock on the night of July 24, the City Council of Columbus met in emergency session and unanimously passed an ordinance authorizing the Mayor to proclaim a civil emergency. This he did forthwith.

For the period July 24 to July 27 inclusive, there were thirty-one requests received by the police department for services in connection with sniper fire, brick-throwing, and arson fires.

On July 27, Daniel Anderson, a convicted felon, assisted by Crawford and Warren, all of whom were active in CAG, attempted to start an arson fire in the Columbus Production Company building. Anderson was found in the building. He was apprehended and admitted being involved in about twenty arson fires. Crawford assisted him in making fire bombs.[2]

On July 30, the members of CAG publicly announced that they would ignore the Mayor's proclamation and would stage a massive march the following day.

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[2]Anderson, Crawford, Warren, and others were indicted in the United States District Court for the Middle District of Georgia of conspiracy to make and possess fire bombs. Anderson plead guilty. Crawford and Warren were found guilty by a jury.

On the morning of July 31, the Mayor made an *ex parte* sworn application to the Superior Court of Muscogee County, Georgia, for an injunction to enjoin the defendants and others from conducting the march. A temporary restraining order was issued. Notwithstanding that an application for a parade permit had been refused, marchers gathered at CAG headquarters preparatory to parading. The Sheriff's department served the restraining order on Howard, one of the leaders of the march, and he read it to a group in the office. Subsequently the public safety director read the restraining order over the public address system in a helicopter which hovered over the assembled marchers.

Ignoring the restraining order, the Mayor's proclamation, and the ordinance requiring a permit, and with the full expectation that they would be arrested, the marchers proceeded to the street where their expectation materialized. There was no resistance and no force was used in making arrests of eighty-one marchers. They were later tried and convicted of violations of the Mayor's Proclamation, the ordinance requiring a parade permit, and contempt for refusing to obey the restraining order. Those convicted in the Recorder's Court for violations of the ordinances appealed to the State Court, and those convicted of contempt appealed to the Court of Appeals of Georgia.[3]

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[3]The Court of Appeals of Georgia, in a unanimous opinion, affirmed the contempt convictions. Its opinion fully considered and disposed of the same constitutional questions concerning the issuance of the restraining order without prior notice and the abridgement of First Amendment rights that appellants have raised on this appeal. *Sumbry, et al. v. Land,* [No. 47316, November 15, 1972], ____ S.E.2d ____.

On August 25, the Columbus City Council rescinded the emergency ordinance and the Mayor rescinded his Proclamation. On September 8, the Superior Court dissolved the injunction which it had issued on July 31.

For the period June 19 through September 6, 1971, during the hours from 8:00 P.M. to 8:00 A.M., Columbus experienced 161 arson fires and 182 false alarms. This substantially exceeded any previous comparative experience. The estimated monetary damages resulting from fires for this period exceeded $1,118,000 and the overtime expense for firemen was $23,722.97. The plaintiffs respond that there was no evidence that either they or the class "of those black people in Columbus and others who desire to act with them" were responsible for the civil disturbances and incendiarism.

Plaintiffs' specifications of error on appeal are as follows: The findings of the district court are at variance with the evidence; declaratory and injunctive relief should have been granted against pending state court proceedings because the ordinances, proclamation, and injunction under which plaintiffs were convicted were facially unconstitutional and were used as part of a conspiracy to harass the plaintiffs; similar relief should have been granted against illegal activity of the defendants not directly involved in state court proceedings; the State contempt proceedings should have been declared illegal and voided because the procedures employed were in violation of state law; and finally, errors in evidentiary rulings require reversal.

The broadside attack made by the plaintiffs on appeal is based upon the assertion that the district court should have found a plan, campaign, pattern of conduct, or conspiracy on the part of the defendants to stifle plaintiffs' First and Fourteenth Amendment rights and that the findings below are therefore at a variance with the evidence and should be set aside. They suggest that we must "analyze the facts in order that appropriate enforcement of the federal right may be assured," *Norris v. Alabama,* 1935, 294 U.S. 587, 590, and that we have a "duty to make independent inquiry and determination of disputed facts." *Pierre v. Louisiana,* 1939, 306 U.S. 345, 358. An amalgam of such out of context statements cannot be parlayed into a new standard of review that would abolish the clearly erroneous rule. In *Norris* and *Pierre* the Supreme Court held that it was not bound by the findings and conclusions of a State Supreme Court, a situation wholly dissimilar to our review of findings of fact in a nonjury trial before a trial court.

At the trial before the district court conflicting factual issues arose. The district court resolved these issues and concluded that there was no conspiracy to impede the plaintiffs from marching and demonstrating in a peaceful manner; that the use of the injunction, ordinances, and proclamation was not only justified but required to maintain some semblance of order during the crisis faced by the city during July and August of 1971; and that the charges that there were general searches of the black community, unlawful surveillance of CAG activities, prosecutions without due process, and unjustified police assaults on the dem-

onstrators failed for lack of proof. Substantial evidence in the record supports the district court's findings, and we are unable to say, nor do we believe, that they are clearly erroneous. *See* Rule 52(a), Fed. R. Civ.P.; *McAllister v. United States*, 1954, 348 U.S. 19; *American Commercial Lines, Inc. v. Eusay*, 5 Cir. 1968, 395 F.2d 717; *Pure Oil Co. v. Bethlehem Steel Co.*, 5 Cir. 1968, 391 F.2d 249. Chief Judge Brown hit the nerve end when he said in *Ohio Barge Line, Inc. v. Oil Transport Co.*, 5 Cir. 1960, 280 F.2d 448, 449:

> If we were to approach it as simply a question — how should this case be decided? — we would effectually bypass a trial court. The problem faced is more nearly that of determining whether the trial judge, faced with the choice — often hard choices between competing versions of simple or complex occurrences — has fairly weighed the matter and has reached a conclusion which seems substantial and reasonable even though another result might have been achieved either by him or others. In this approach it is our view that the District Court's findings neither should, nor may be disturbed in this case.

Next the plaintiffs attack the disorderly conduct, loitering, parading, picketing, and demonstration ordinances, as well as the injunction and proclamation, as being unconstitutional on their face and as having been applied in an unconstitutional manner as a part of a pattern harassment of the plaintiffs. We need not pause long to discuss this contention. The emer-

gency ordinance and the proclamation have been rescinded and the injunction dissolved. We decline the invitation of the plaintiffs to pass judgment on these non-existent laws. Furthermore, prosecutions under the ordinances and for contempt of the injunctive order were pending in the state courts at the time this action was filed and have been subsequently appealed. The "possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good faith attempts to enforce it" absent "any showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief." *Younger v. Harris*, 1971, 401 U.S. 37, 54; *see Jackson v. Dobbs*, 5 Cir. 1971, 442 F.2d 928. In like manner, "where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well." *Samuels v. Mackell*, 1971, 401 U.S. 66, 73.

To avoid the roadblock of *Younger* and *Mackell*, plaintiffs argue that the ordinances, injunction, and proclamation utilized by the City of Columbus, alone, and when coupled with police misconduct and harassment, warranted federal declaratory and injunctive relief against the pending state proceedings. The short answer is, of course, a reiteration of what has already been said — the district court found that the arrests were made in good faith and not for the purposes of harassment and intimidation, and that the state prosecutions were carried on in good faith. We cannot and will not overturn these findings by the district court.

Plaintiffs further press us not only to disregard the teaching of the *Younger* sextet with respect to pending prosecutions on the premise that we should overturn the trial court's findings of fact, but they ask us to

act as an appellate tribunal to review the actions taken in the State *nisi prius* courts and the judgment and mandate of the Court of Appeals of Georgia, even though the plaintiffs have the right to petition the Supreme Court of Georgia and the Supreme Court of the United States for certiorari.[4] The state courts had jurisdiction of both the subject matter[5] and the parties. It was the province of the State courts to decide the constitutional question raised there and here, and their decision, whether right or wrong, was an exercise of jurisdiction. It follows that

> no court of the United States other than this [Supreme] Court could entertain a proceeding to reverse or modify the judgment for errors of that character. * * * To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original. *Rooker v. Fidelity Trust Co.*, 1923, 263 U.S. 413, 416.

Finally, the plaintiffs assign error in various evidentiary rulings made by the trial court. While it is true that the court permitted some hearsay testimony to be adduced by the defendants, over objection, on the ground that the defendants had not objected when plaintiffs introduced hearsay, a linsey-woolsey quid pro quo, the court made it clear that since the trial was without a jury it would give proper consideration

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[4]See note 3 *supra*.

[5]In the appeals from the contempt convictions the Court of Appeals of Georgia had before it and determined the precise issue of the validity *vel non* of the *ex parte* state court injunction.

to the probative value of such evidence. The objection was thereupon withdrawn and cannot be revived here. Plaintiffs also objected, without avail, to a film depicting a raid on the Black Panther headquarters. We think that this reel was irrelevant, but "[w]e also take cognizance of the fact that this was a bench trial, and, as such, it is presumed that the trial judge relied only upon properly admitted and relevant evidence." *United States v. Dillon,* 5 Cir. 1971, 436 F.2d 1093, 1095.

Plaintiffs also complain that the evidence about fires, the difficulty of fighting fires, and false alarms was immaterial and should have been excluded. We disagree. There was substantial direct and circumstantial evidence that at least some of the plaintiffs were involved in the arson fires and that the false alarms and impediments placed in the way of the fire fighters, as well as the assaults made upon them, had a direct relationship to the demonstrations and civil unrest which the plaintiffs planned and executed. "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses." *Cox v. New Hampshire,* 1941, 312 U.S. 569, 574.

We have considered and find without merit the errors asserted by plaintiffs with respect to the trial court's rulings sustaining in part the Fifth Amendment privilege claimed by the witness Anderson, the contention that the court made a finding of fact based on excluded evidence, and the court's exclusion of testimony concerning the racial attitudes and concepts of the witnesses.

The judgment of the district court is

AFFIRMED